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ONTARIO LABOUR RELATIONS BOARD REPORTS

April 1991



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1991] OLRB REP. APRIL

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

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Evidence - First Contract Arbitration - Practice and Procedure - Board declining to hear evidence relating to alleged refusal to recognize union's bargaining authority on ground that it was not relevant to union's application as pleaded - Board permitting certain documents to be put to witness during cross-examination even though documents not listed in employer's Schedule F - Board declining to receive into evidence documents passed between parties through conciliation officer, as well as other documents not listed by employer in Schedule F - Board finding union's intransigence leading to breakdown of negotiations and dismissing application for first contract arbitration

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *G. O. Shamanski* and *K. Davies*.

APPEARANCES: *W. Dubinsky* and *W. McIntyre* for the applicant; *Y. Fricot* and *R. York* for the respondent.

DECISION OF THE BOARD; April 2, 1991

I The Application

1. By decision dated November 16, 1990, the Board dismissed this application, under section 40a of the *Labour Relations Act*, for a direction that a first collective agreement between the parties be settled by arbitration. The Board's reasons for dismissing the application, and for several evidentiary rulings given in the course of the hearing now follow.

2. In applying for a direction as aforesaid, the applicant trade union alleged that the respondent had taken an uncompromising bargaining position or positions without reasonable justification and had failed to make reasonable efforts to conclude a collective agreement, contrary to clauses (b) and (c) of subsection 40a(2) respectively.

3. When the application came on for hearing on August 22, 1990, the respondent requested an adjournment of the hearing scheduled for the following day. Upon hearing the representations of the parties, the Board denied that request for oral reasons given at the time (which are essentially the same reasons for which an adjournment request was denied in *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441 at paragraph 3).

II Evidentiary Rulings

4. The Board was also called upon to make a number of other evidentiary rulings in the course of the hearing. The more significant ones bear repeating.

5. First, this application is but one of many matters involving these parties which were before the Board at the time of the hearing herein, or had previously been before it. Some of those other matters had, at the time of the hearing herein, been disposed of, either on agreement of the parties or by decision of the Board. Others remained outstanding. The applicant's statement of fact contained references to various of these other proceedings. The respondent objected to the applicant's attempt to adduce evidence in that respect. Upon hearing the representations of the parties, the Board ruled that it would admit evidence of the dates on which the various applications or complaints referred to in the applicant's statement of fact were made, the general nature of the application or complaint, when and how they were disposed of, and any Board decisions with respect thereto. The Board ruled that it would not hear any other evidence with respect to the alle-

gations made in any of these other applications or complaints which had not been particularized in this application, whether these had been disposed of by the Board, withdrawn, settled or were still outstanding. It would not, in our view, have been appropriate to either relitigate matters which have been disposed of by the Board, or to dissect the parties' conduct with respect to matters which had been settled or withdrawn. Further, the mere fact that allegations had been made, or were being contemplated, in other proceedings could have had no probative value in this proceeding. Finally, we were not satisfied that these other proceedings were relevant to our consideration of the issues raised by the pleadings in this application to more than the limited extent of establishing the background to it. It would not have been appropriate for us to hear evidence with respect to matters which were neither relevant to this application nor otherwise properly before us. Parenthetically, we observe that the documents which were placed in evidence before the Board in accordance with our ruling turned out to have little or no probative value.

6. Second, the applicant sought to lead evidence which it asserted would show that the respondent had refused to recognize the applicant's bargaining authority. Upon objection by the respondent, the Board ruled such evidence to be inadmissible because it was not relevant to the application as pleaded. Clause 40a(2)(a) specifically provides that where the process of collective bargaining has been unsuccessful because of the refusal of the employer to recognize the bargaining authority of the trade union, the Board shall direct a settlement by arbitration of a first collective agreement between the parties. Board Practice Note No. 18 specifies that an applicant for direction that a first collective agreement be settled by arbitration must provide, *inter alia*, at subsection 1(j):

"a detailed statement of the material facts, acts and omissions on which the applicant intends to rely, including the time when and the place where the acts or omissions referred to occurred and the name(s) of the person(s) who engaged in the specified conduct".

In doing so in this application, the applicant specifically pleaded that the respondent had taken uncompromising bargaining positions without reasonable justification and that it had failed to make reasonable efforts to conclude a collective agreement; a clear reference to clauses 40a(2)(b) and (c). There is no indication anywhere in the applicant's material that it intended to assert that the respondent had refused to recognize its bargaining authority. Accordingly, that was not a matter which had been properly placed in issue between the parties, and was not a part of the case the respondent could reasonably have been expected to prepare to meet. Practice Note No. 18 requires both parties to fully particularize the respective positions and to list and provide copies of all documents on which they intend to rely. Its purpose is to avoid the delay often attendant upon surprises sprung by one party on another, to define the matters in issue between the parties and so provide a basis for settlement or, if no settlement can be reached, to provide the basis for an expeditious hearing of the application. Having pleaded the basis upon which it has made an application under section 40a, an applicant cannot, in the absence of some cogent reason for allowing it to do so, be allowed to depart from its pleadings. In this case, the applicant offered no such cogent reason or other explanation.

7. Third, in the course of his cross-examination of Wilf McIntyre, the applicant's only witness, counsel for the respondent sought to have the witness use certain documents, which had not been listed in its Schedule F (list of documents upon which the respondent intended to rely) filed by the respondent, as an "aid to memory". Counsel stated that he was not seeking to have the documents themselves entered as evidence before the Board. The applicant objected, arguing that the documents could not be used because they had not been listed by the respondent as required by Practice Note No. 18.

8. The Board ruled that the documents could be put to the witness to try to refresh his

memory. Earlier in his cross-examination, McIntyre had testified that he had reviewed the documents in question both at the time they were received by the respondent, and subsequently in conjunction with his own notes to prepare himself to testify in this proceeding. It had already become evident that McIntyre had little reliable independent recollection of what had transpired in collective bargaining between the parties. Throughout his testimony, both in examination in chief and in cross-examination, McIntyre relied heavily upon his notes and other materials to refresh his memory in that respect. The respondent sought to test McIntyre's evidence by putting to him documents which he had already admitted he had used to prepare himself for the hearing. In the circumstances, and having regard to the purpose for which the respondent sought to use them, we were satisfied that the documents in question could be used by the respondent in its cross-examination of the witness, notwithstanding that they were not listed in the respondent's materials as documents upon which it intended to rely.

9. Fourth, at the hearing on October 12, 1990, the respondent sought to place into evidence a document identified as "Proposed Amendments by Atway Transport Inc." dated May 23, 1990. Although that document, and three others (listed as numbers five, six and seven in its Schedule F) as documents upon which the respondent intended to rely in this proceeding, it quickly became apparent that all four were documents which had been passed (at a meeting on May 23, 1990) from one party to the other through the conciliation officer appointed by the Minister to assist the parties in their collective bargaining. The parties were not in each others presence when any of these four documents were given to or received from the conciliation officer.

10. Section 111(2) of the *Labour Relations Act* provides that:

• • •

(2) No information or material furnished to or received by a conciliation officer or a mediator,

(a) under this Act; or

(b) in the course of any endeavour that a conciliation officer may make under the direction of the Minister to effect a collective agreement after the Minister,

(i) has released the report of a conciliation board or a mediator, or

(ii) has informed the parties that he does not consider it advisable to appoint a conciliation board,

shall be disclosed except to the Minister, the Deputy Minister of Labour or the chief conciliation officer of the Ministry of Labour.

• • •

Counsel for the respondent referred the Board to *Gorman Eckert and Company Limited*, [1969] OLRB Rep. Dec. 1135. He argued that as an exclusionary provision, section 111(2) should be narrowly construed to make inadmissible "private" but not "non-private" or "public" communications, and that documents with respect to which a conciliator or mediator was a "mere conduit" between the parties should be considered to be non-private communications not caught by the exclusion in section 111(2).

11. We did not agree. The appropriate approach to subsection 111(2) was discussed in *Shaw-Almex Industries Limited*, [1984] OLRB Rep. Jan. 109 (at paragraphs 13 to 17):

13. Read literally, section 111(2) would exclude evidence of face to face bargaining conducted in

the presence of a conciliation officer. The Board's decision in *Trenton Memorial Hospital* expressly left open the questions whether the general principles there considered would require the exclusion of such evidence. That issue arose for consideration in *Gorman Eckert and Company Limited*, [1969] OLRB Rep. Dec. 1135, which also involved an application for consent to institute prosecution against an employer for its alleged refusal to bargain in good faith. The predecessor of section 111(2) had by then been enacted. The question for determination by the Board was whether it would admit a proposed collective agreement which had been submitted both to the union and to the conciliation officer in the course of the conciliation process. The Board concluded that what is now section 111(2) was intended to protect conversations of a private nature, but not conversations or matters of a non-private nature occurring in the presence of both parties. The proposed collective agreement, having been directly communicated by the employer to the trade union, was not by reason of its communication also to the conciliation officer a protected communication.

14. The Board reviewed the scope of subsection (2) of section 111 again in *CCH Canadian Limited*, [1974] OLRB Rep. June 375, where the trade union applicant applied for consent to prosecute the respondent employer for its alleged failure to bargain in good faith. The issue which arose there, and its resolution, are set out in the following passage from the decision in that case:

9. Mr. Cavalluzzo, through his witness Mr. H. Peacock, who was present at most of the negotiation sessions, wanted to adduce evidence of the course of negotiations through both conciliation and mediation. There was a strong implication that this involved the tendering of evidence about what the conciliation officer or mediator said to Mr. Peacock or what he said to the officers and a strict reading of section [111(2)] would preclude any evidence of this kind. However, in *Bakery and Confectionery Workers' International Union of America, Local 415 and Gorman Eckert and Company Limited*, OLRB M.R. December 1969, p.1135, the questions arose as to whether a proposed collective agreement submitted by one party to the other during conciliation (it was submitted to the conciliation officer) was admissible in evidence. After extensively reviewing the case of *Building Service Employees' International Union, Local 183 and Trenton Memorial Hospital* 64 CLLC ¶16,302 which gave rise to the enactment of sections [111(2), 111(3), 111(4) and 111(5)] the Board ruled that "the purposes of Section 83(2) [now section 111(2)] was intended to protect those conversations of a private nature but that conversations or matters of a non-private nature are not protected by section 83(2) [now section 111(2)]". Accordingly, the proposed collective agreement presented to the applicant and to the conciliation officer was found to be non-private nature and properly admissible in evidence.

10. It must be recognized that neither section [15] nor section [111(2)] can be read to the exclusion of the other. The Board must attempt to accommodate and integrate the purposes of each of these sections and only where there is an irreconcilable difference between them should the Board read the more specific wording of section [111(2)] as overriding the values of section 14. It is believed that the *Gorman Eckert* decision follows such an admonition. The "private-non-private" distinction breathes meaning into the obligation to bargain in good faith during the conciliation and mediation processes while recognizing the fragile function of the conciliator or mediator - a function of integrity of which depends upon the confidentiality of private communications. This confidentiality was outlined by the Board in *Canadian Stackpole Ltd.* 59 CLLC ¶18, 412 wherein the majority wrote at p.1778:

Although the extent to which an administrative board may rely on official notice has not been clearly defined, it would be preposterous to suppose that the members of this Board, constituted as it is, can fail to take cognizance of the fact that most successful conciliators have achieved their success by the use of manifold techniques among which are those of conferring separately with each of the parties and of meeting only with key principals and of the further fact that conciliators in this jurisdiction have from time to time relied on each of the these last two mentioned methods of breaking down the barriers to the settlement of a dispute. It is common knowledge that skilled conciliators act as a channel of communication between the

employer, on the one hand, and a senior official of the trade union, on the other, at time without a single employee even being aware that the conciliator is dealing with either of the "principals". It would require clear and unequivocal language in the Act to convince us that it was the intention of the Legislature, in enacting the several provisions of the Act that are included under the heading "Negotiations of Collective Agreements", to lay down that conciliation officers must desist from resorting to such techniques should they in their wisdom in any particular case deem it desirable to do so, except perhaps where the other party to the proceeding consents thereto. Similarly we cannot bring ourselves to believe that the Legislature in enacting the sections referred to, intended to deny to conciliation boards freedom to resort to tested and time-honoured methods of reconciling the parties to an industrial dispute, as they have done so in this jurisdiction time without number in the past.

Accordingly, private communications - communications with the conciliator or mediator when the parties are not in presence of each other - must have protection of section [111(2)]. This is so because the mediator or conciliator must be able to discover a party's true "resistance point" [see; *Stevens, Strategy and Collective Bargaining Negotiations* (1963) p.122 and *Simkin, Mediation* (1973)] and to do so a party must be assured [sic] that the confidentiality of such communications is inviolable. However public statements - statements made while the parties are in each others presence - if admissible in evidence do not undermine the integrity of the conciliator's or mediator's function and hence are not precluded by section [111(2)].

11. Applying these principles to the facts at hand, the Board was prepared to permit Mr. Peacock to give his opinion that at the conclusion of the conciliation and mediation processes the parties were little closer to reaching an agreement but the Board was not prepared to allow him to elaborate on this opinion if it entailed the description of communications he had had with the mediator or conciliator while out of the presence of the company's negotiators. Such communications would be clearly of a private nature.

12. Finally, Mr. Cavalluzzo argued that section [111(2)] should be analogized to the privilege of solicitor and client. In other words, he suggested that section [111(2)] was a privilege of the parties before the Board and therefore could be waived by any one of the parties. The Board rejected this contention. Section [111(2)] is intended to protect the integrity of the conciliator's or mediator's office - it is not a privilege of the parties. If one of the parties could waive the application of section [111(2)] and reveal the communications between it and a conciliator for instance, the effectiveness of this official could be seriously impaired. He may have tempered the comments received from the parties or made projections that were based on his own informed but personal speculation. Such revelations would only undermine the usefulness of such offices.

15. The Board's approach to these questions has always recognized that the primary function of a conciliation officer or mediator is not to act as a postman, courier or telegraph service. He is not the agent of either party for the delivery or receipt of messages to and from the other. The officer has no duty to repeat to one party everything he is told by the other. Indeed, as the above-quoted passages demonstrate, he attempts to have the parties disclose to him things that they do not wish disclosed to the opposite party. Each party is aware that this occurs. This adds to the effectiveness of the officer's private communications are often carefully crafted so as to blur the line between speculation and revelation. Of course, conciliation officers do convey those positions and changes of position which either party wishes conveyed. Even these communications, however, take place within a context of confidential discussion of the nature sought to be protected both by the principles outlined in *Trenton Memorial Hospital* and the express provisions of section 111 of the Act, and are ordinarily inseparable from the context when they occur in the absence of the party from which they originate.

16. Accordingly, we do not accept the argument that testimony concerning one party's private conversations with a conciliation officer or mediator should be accepted in evidence as *prima*

facie proof of what must have taken place between the mediator or conciliation officer and the opposite party. Apart from the doubtful logic and, in the case of statements by the mediator, the hearsay dangers involved in that approach, its adoption would completely undermine the confidentiality of such private conversations. One party's revelations would force the other party to reveal his version of what he said to the mediator. Both parties would then clamor for permission to call the mediator to resolve the inevitable inconsistencies. Even on a question (if relevant) of the party's mental state, any inference that might be drawn from the party's version of his conversations with the mediator is no more trustworthy than his direct statement of what he was thinking at the time, since the other participant in the alleged conversation is not a compellable witness. Reference to the conversation, therefore, adds nothing but further adverse pressure on the confidentiality, and thence the efficacy, of the conciliation process.

17. We have reviewed the reported decisions in *The Ottawa Journal case*, *supra*. Only one passage suggests that the Board there entertained any evidence of discussions which occurred between a "mediator" and one party in the absence of the other. That appears at paragraph 38 of the Board's first decision at [1977] OLRB Rep. June 309, at p.318:

38. The parties then met with Ray Illing, a Ministry of Labour mediator. The meetings commenced on April 1st, and continued through the weekend. On Saturday, *The Journal*, through the mediator, presented a proposal in respect of the Joint Council. The proposal dealt with a number of proposals relating to the terms and conditions of employment of the pressmen, stereotypers, and mailers, and also a proposal referring to a "damage and good conduct clause and orderly return to work clause". At the mediator's request, *The Journal* provided a clarification of this latter matter on the next day. This clarification referred to specified damage to vehicles, property, and newspapers, and the reservation of the right to claim damages resulting from the union boycotts. On that same day, *The Journal* presented, through the mediator, its proposal for the Guild contract. Then, on Tuesday, April 5th, *The Journal* presented its proposal for the Ottawa Typographical Union contract. These two proposals also contained a proposal concerning damage, good conduct, and orderly return to work. The Unions apparently regarded the first two proposals as being bargainable, but regarded the proposal for the Ottawa Typographical Union as being completely unacceptable, primarily because, in addition to not-giving any concession on jurisdiction, it provided no job guarantees at all.

[emphasis added]

It is not clear how these facts were established in evidence. They might have been agreed facts. If they were, their admission would not have offended the principles established in the Board decisions reviewed in this decision. While we do not know from the *Ottawa Journal* decision how the parties established the facts recited in the passage quoted above, we do know there is no discussion of their admissibility of section 111 of the Act or of the underlying principles reviewed in the Board's previous jurisprudence. Any intended departure from that jurisprudence would, we believe, have been the subject of express comment by the Board. We do not, therefore, take that case as confirming or announcing a policy inconsistent with that jurisprudence.

18. In the result, we adopt the approach taken by the Board in *CCH Canadian Limited*, *supra*. We will not entertain evidence from either party as to what was discussed between its representative and a conciliator or mediator in the absence of the other party where, as here, the other party objects to the introduction of that evidence. We will give no weight to any evidence of that sort which may have been received up to this point.

19. Evidence of direct communications between the parties is not, of course, affected by this ruling. That is the answer to any concern that the Board's approach hinders enforcement of the duty to bargain in good faith. The course of negotiations can be charted by evidence of direct communications undertaken from time to time to confirm or obtain confirmation of changes in position. Each party, therefore, has the means to ensure that the confidentiality of the conciliation process is not used as a cloak for bad faith bargaining.

(See also *Aristocraft Vinyl Inc.* [1985] OLRB Rep. June 799, *Cofu Forming and Construction Limited*, [1987] OLRB Rep. Oct. 1213, *Dell Equipment*, [1989] OLRB Rep. Jan. 19).

12. In our view, the words of subsection 111(2) are clear. No material or information furnished to or received by a conciliation officer or mediator in the discharge of his/her duties under the *Labour Relations Act* may be disclosed except as provided in the section itself. Unlike subsections 111(1) and (6), subsection 111(2) gives the Board no discretion in that respect. There are no exceptions made for any kinds of “materials” or for things which are of a “non-private” nature, however that term might be defined.

13. The issue is one of admissibility, not relevance. Subsection 111(2) is designed to protect the integrity of the conciliation/mediation process. It creates a kind of labour relations black hole from which no light is allowed to escape. The purpose of section 111(2) would be frustrated by anything less than a complete protection from outside scrutiny of any material or information furnished to or received by a conciliator or mediator in the course of his/her duties. Accordingly, nothing which passes through a conciliator or mediator without also being passed directly to the other party can be disclosed to the Board. It follows that no such information or material can be admitted into evidence before the Board.

14. In our respectful view, what has sometimes been described as the “private” versus “non-private” distinction is perhaps more aptly described as a distinction between communications which pass directly between the parties and those which pass through a conciliator/mediator. In order to determine whether a communication in the conciliation/mediation process was a “private” one, the Board would have to examine both the communication and the circumstances in which it was made and subsequently received. This would subject the conciliation/mediation process to the very scrutiny which subsection 111(2) is specifically designed to avoid. A conciliator or mediator may be told something when s/he receives a document or other material, or may “comment” on it when s/he “delivers” it to the other party. Because this could affect the meaning to be given to the material or put the subsequent actions of either party into perspective, the Board could again be in the position of examining the circumstances or, in the alternative, giving no weight to the material. Consequently, the appropriate distinction is between communications, whether oral or written, which pass directly between the parties, and communications, oral or written, which pass through a conciliator/mediator. The former require no scrutiny of the conciliation/mediation process *per se* and do not fall within the subsection 111(2) exclusion. Consequently, they may be disclosed and evidence with respect to them is admissible before the Board. The latter fall squarely within the subsection 111(2) exclusion and are therefore not admissible.

15. The dilemma in which the respondent found itself could easily have been avoided. It could have, either at the time, or subsequent to May 23 (and July 9), 1990 have delivered the documents in question directly to the applicant, with or without an indication that it wished to confirm that it made the proposals therein, or that it intended to rely upon them in the future if necessary.

16. The Board therefore ruled that the four documents upon which the respondent sought to rely were not admissible as evidence before the Board.

17. The respondent then sought leave of the Board to introduce and rely upon documents which it asserted had been handed directly by its representatives to representatives of the applicant on May 23, 1990, which documents it had not included on the list of documents upon which it intended to rely which it had filed as Schedule F to its reply. The applicant opposed the respondent’s request.

18. Clauses (g), (h) and (i), in section 5 of Board Practice Note No. 18 with respect to

applications for a direction that a first collective agreement be settled by arbitration provide that a respondent's reply must include:

...

- (g) a detailed statement,
 - (i) identifying the statements in the application with which the respondent agrees,
 - (ii) identifying the statements in the application with which the respondent disagrees, and setting out the material facts, acts and omissions which constitute the respondent's version of the matters alleged in the statements with which the respondent disagrees, and
 - (iii) setting out all other material facts, acts and omissions on which the respondent intends to rely, including the time when and the place where the acts and omissions referred to occurred and the name(s) of the person(s) who engaged in the specified conduct;
- (h) a list of all documents on which the respondent intends to rely;
 - (i) a copy of all documents in the respondent's possession on which it intends to rely;

...

19. The applicant's statement of fact includes the following assertions:

- 28. At the meeting held on May 23, 1990 from 11:00 a.m. to the evening hours, the parties were only able to agree upon the additional items of: two minor portions of the grievance procedure; minor agreements on co-operation to reduce the risk of employment injury and to abide by the Ontario Occupational Health and Safety Act; to permit the company to pose [sic] notices on bulletin boards; to have a letter of understanding that the Union would hold the company harmless concerning Union dues; and bereavement leave.
- 29. At this meeting the Union had submitted its fourth complete proposal to the respondent. The respondent walked out of the meeting and refused to reply to the fourth proposal. The Union was advised by the conciliation officer that no further meetings would be scheduled.

In its statement of fact, delivered in accordance with clause 5(g) of Practice Note No. 18, the respondent expressly agreed with, *inter alia*, the applicant's assertions in its paragraph 28. The respondent went on to plead, at paragraphs 31 to 33 of its statement (Schedule E), that:

- 31. Following the Union's Application for Conciliation, a meeting with the Conciliation Officer was scheduled for May 23, 1990. The Company's monetary proposal was also put to the Union prior to this meeting but was not discussed during the course thereof. (See Exhibit #15 of Application)
- 32. On May 23, 1990, an [sic] joint meeting was initially held with the Conciliation Officer. As a result of the Union insistence that all offers be in writing the Company left the meeting and prepared and presented through the Conciliation Officer several proposed amendments. (See Exhibit #4 attached)
- 33. Approximately three hours later the Union's response was received. It did not, to the Company, in any way indicate either flexibility or a willingness to deal with any of the issues then being discussed. As a result, the Company advised the Conciliator that it saw no point in continuing further. (See Exhibit #5 attached)

20. In our view, it should have been evident to the respondent that what had transpired between the parties on May 23, 1990 might be of some significance, both as part of the overall collective bargaining between the parties and in itself, in this application. The respondent also knew, or ought to have known, of subsection 111(2) of the Act and that it was at least possible that the documents which it itself had pleaded had passed between the parties only through the conciliator, would not be admissible as evidence in this proceeding (i.e. the documents which the Board ruled inadmissible in paragraphs 9 to 16 above).

21. The respondent offered no cogent explanation for failing to list and produce those documents which it sought leave to put forward. Implicit in its submissions is that it didn't think it would need them. The respondent submitted that the Board should exercise its discretion as requested on the basis of "fairness" in the sense that the Board ought to do what it can to ensure that there is sufficient evidence before it to allow the Board to come to an informed decision in this application. The respondent submitted that if the Board refused to grant leave the purpose of the hearing would effectively be frustrated. The respondent did concede that it would be able to prove its case without the documents in question, but said that it would take it longer to do so.

22. The applicant submitted that the purpose of Practice Note No. 18 is to facilitate a fair and expeditious hearing. It suggested that both the respondent and the applicant had planned to present their respective cases in a certain way and that what the respondent was really asking the Board to do was to permit it to restructure its case. The applicant submitted that the applicant knew or ought to have known that they would be stuck with the results of decisions regarding their approach to the case.

23. In the circumstances, we saw nothing unfair to the respondent about applying the rules set out in Practice Note No. 18 to it. The respondent gave no cogent reason to not do so. There is no reason why the respondent could not have produced copies of the documents in question, as required by Practice Note No. 18. Indeed, the respondent had made a conscious decision that the documents that it sought leave to adduce were unnecessary to its case. This decision was based on the assumption that it would be able to rely upon certain other documents, which assumption, as a result of the Board's ruling as aforesaid, turned out to be incorrect. The fact that a party may have misjudged its situation is not, in our view, a sufficient reason to relieve it from its disclosure obligations. We were also satisfied that the applicant was entitled to prepare its case on the basis of the materials filed and that it would have been unfair and prejudicial to the applicant to allow the respondent to depart from the case as it disclosed in its pleadings and materials in the absence of a cogent reason to do so.

24. The fact that the result *might* be that the state of the evidence before the Board is somewhat less than satisfactory was not, in our view, a reason to grant the respondent's request either. The nature of proceedings before the Board is such that the Board must rely on the parties to put their respective cases forward. Unfortunately, this sometimes results in the Board being left with a less than completely satisfactory evidentiary basis for its considerations. Nevertheless, in every case, including this one, the Board must make its decision on the basis of the evidence properly before it. In the result, we dismissed the respondent's request for leave to adduce into evidence the documents which the respondent had not listed and produced in accordance with Board Practice Note No. 18.

III The Merits of the Application

25. Although Fred Miron, President of the applicant at all material times, was, both on the face of the application and the evidence, the applicant's chief negotiator and its "directing mind" during the collective bargaining between the parties, Wilf McIntyre, the applicant's first Vice-Pres-

ident at all material times, was the sole witness to testify on its behalf. Upon hearing the applicant's evidence, the respondent advised the Board that it had no evidence which it wished to call. The application was then argued on the basis of the evidence led by the applicant.

26. Miron's absence from the proceedings turned out to be conspicuous. The applicant made no attempt to explain why Miron did not participate in this proceeding, either as a witness or otherwise. The Board was left with only such facts as were not in dispute and McIntyre's testimony.

27. While there is no doubting McIntyre's sincerity, his testimony was wholly unsatisfactory as an evidentiary basis for this application. McIntyre displayed an almost complete inability to recall the material events independent of notes he had made contemporaneously with those events, and which notes he admitted were incomplete. He was unable to satisfactorily explain the applicant's approach to or position in bargaining, or to identify the differences between the positions of the parties. Having observed him as a witness and heard his testimony, we were satisfied that any recollection he professed to have independent of his notes was not reliable. In that respect, McIntyre's recollection was remarkably better when he was questioned by the applicant's representative than when he was cross-examined by the respondent. Under cross-examination, McIntyre was evasive, argumentative and generally not responsive to the questions asked of him. As a result, he only grudgingly agreed to things which were or should have been obvious to him from his own notes and repeatedly lapsed into a refrain to the effect that the respondent had "walked out" or refused to bargain, rather than answer the question asked of him. We therefore gave no weight to the testimony which he gave independent of documents which are before the Board or his notes. Further, we were not prepared to give as much weight as we might otherwise have to evidence he gave based on his notes because those notes were, by his own admission, incomplete.

28. What the evidence before the Board did reveal was that the respondent is based in Thunder Bay and is engaged in the transportation of raw forest products by truck to saw mills and pulp and paper mills in north western Ontario. On July 8, 1990, the "IWA-Canada" was certified by the Board (differently constituted) as the exclusive bargaining agent for all employees of the respondent employed as truck or transport drivers at and out of the District of Thunder Bay, save and except foremen and persons above the rank of foremen. Although the applicant herein styled itself as "Local 2693, IWA-Canada", there was no suggestion that it does not hold the bargaining rights obtained by "IWA-Canada", or that it was otherwise not entitled to bring this application.

29. By letter dated January 15, 1990, the applicant gave the respondent the requisite notice to bargain, in accordance with section 14 of the *Labour Relations Act*. Pursuant thereto the parties met on February 8, 1990. At that meeting the applicant presented its collective agreement with Canadian Pacific Forest Products Limited as the basis for collective bargaining and requested information with respect to the then current wages and benefits being received by bargaining unit employees. Before receiving that information some three weeks later, the applicant sent a collective bargaining proposal to the respondent. There were extensive negotiations between the parties on March 12 and 15, 1990 at the conclusion of which the parties agreed to meet again on May 23, 1990. However, the applicant was not satisfied with the progress of the negotiations and, on April 12, 1990, applied for conciliation. On May 23, 1990 the parties exchanged proposals through a conciliation officer appointed by the Minister. By letter dated June 6, 1990, the parties were advised that the Minister had decided not to appoint a Board of Conciliation. On July 9, 1990, the parties met with a mediator. On July 30, 1990, the applicant filed this application.

30. We find it unnecessary to recount in detail what happened at the individual bargaining sessions. It is evident that the applicant came to the bargaining table determined to obtain what it

considers to be, in effect, its standard collective agreement. The structure and content of the applicant's proposals in that respect, and even the applicant's evidence at the hearing of this application made that readily apparent.

31. Subsections 40a(1) and (2) of the *Labour Relations Act* provide that:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

Since *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005, the seminal decision dealing with the first contract provisions in the Act, the Board has consistently acknowledged that section 40a is remedial legislation which should be liberally construed, but also that it is not intended to supplant the primacy of free collective bargaining or to provide automatic access to arbitration in all cases where the parties are unable to negotiate a first collective agreement. The provisions of section 40a are statutory recognition of the importance of and difficulties which may be encountered in situations where a first collective agreement is being negotiated. Since there would be no application under section 40a if a first collective agreement was achieved, the mere lack of one does not, by itself, mean that the process of collective bargaining has been unsuccessful or, if it has been unsuccessful, that it is appropriate that a first collective agreement between the parties be settled by arbitration. Further, as the Board's decisions in *Teledyne Industries Canada Limited*, *supra* and *Juvenile Detention (Niagara) Inc.*, [1987] OLRB Rep. Jan. 66 illustrate, an application under section 40a may be premature. However, and as the Board's jurisprudence also amply illustrates, there is no absolute minimum point prior to which an application cannot be successfully made. What that minimum point is in any given case will depend on the circumstances of that case.

32. As its preamble suggests, the *Labour Relations Act* is designed to encourage collective bargaining between employers and trade unions representing their employees. The Act contemplates that certification (or voluntary recognition) of a trade union will initiate a collective bargaining process which will lead to a collective agreement between the employer and the trade union, which regulates the terms and conditions of employment of the bargaining unit employees. On occasion, the process does not result in a collective agreement. The Act does not require that an employer be happy that its employees are represented by a trade union. Nor does it guarantee that a collective agreement will ultimately be achieved after a successful application for certification. However, the Act does (in section 15) require an employer to bargain in good faith and make every reasonable effort to make a collective agreement with a trade union which has been certified as the exclusive bargaining agent for its employees. Section 40a is intended to provide a remedy

where the process of collective bargaining in a first collective agreement has been unsuccessful for any of the reasons set out in subsection 40a(2).

33. In argument, the applicant referred to the Board's decisions in *Nepean Roof Trust*, *supra*, *Formula Plastics Inc.*, [1987] OLRB Rep. May 702, *Crane Canada Inc.*, [1988] OLRB Rep. Jan. 13, *MacMillan Blodel Buildings Material Limited*, [1990] OLRB Rep. Jan. 58 and *Peacock Lumber Limited*, [1990] OLRB Rep. May 584.

34. We agreed with the approach to section 40a taken in those cases. We did not agree that a direction under subsection 40a(2) was justified in this case. This was not a case in which, for example, the evidence indicated that the respondent had uncompromisingly insisted on a "no improvements" collective agreement or that anything in a collective agreement between the parties provide bargaining unit employees with less than the *status quo*. Moreover, we were not satisfied that the respondent's positions were either unreasonable or so rigid as to be the cause of the breakdown in the negotiations between the parties. On the contrary, it seemed to us that it was the applicant's intransigence, including its insistence upon a recognition clause which it could not lawfully bargain to impasse, and its refusal to budge from its "standard collective agreement" or to pay any real attention to the respondent's proposals and explanations, which led to the breakdown between the parties.

35. The applicant neither asked nor cared about the manner in which the respondent structured its operations. Even though the applicant must have known something of the respondent's structure from prior litigation between the parties (such as the complaint dealt with in *Atway Transport Inc.* [1989] OLRB Rep. June 540, for example), its proposals reflect no acknowledgment or concern in that respect.

36. For example, the applicant's proposed "recognition-jurisdiction" clause, upon which it steadfastly insisted from the outset reads as follows:

ARTICLE III - RECOGNITION-JURISDICTION

3.01(a) The Company recognizes the Union as the sole collective bargaining agency for all of its employees who are engaged in woods operations on the limits, and on the work sites, of the Company. For the purposes of this article, Company employees shall be all those employed in the job classifications set out in the wage schedule attached to and forming a part of this Agreement, including those who are employed on job classifications which may be established and become part of the attached wage schedule during the term of this Agreement.

3.01(b) The employees of contractors engaged by the Company on the limits and work sites of the Company shall be considered employees within the terms of this Agreement; save and except the employees of contractors and/or the contractors who are engaged to perform occasional special services not commonly performed by employees covered by the terms of this Agreement, employees of contractors where such contractors are engaged for the purpose of erecting structures and where such a contractor is bound by an Agreement with a union or unions affiliated with a central labour body covering such work.

3.02 Supervisory personnel, which includes contractors whose employees are considered to be employees under this Agreement, shall not perform work which would normally be a function of an employee in the job classifications covered by this Agreement, except when instructing employees and in cases of emergency which involves physical danger to employees or danger to property.

This clause, which is rather interesting in its own right, reflects neither the bargaining rights granted to the applicant by the Board nor the respondent's operations. The applicant does not hold any bargaining rights with respect to the respondent for persons other than employees of the

respondent employed as truck and transport drivers at and out of the District of Thunder Bay. To the extent that the applicant's proposal covered persons for whom the applicant does not hold bargaining rights, as on the evidence it did, it is an attempt to extend the applicant's bargaining rights. While a trade union may ask for such an extension, it has long been settled that such a demand cannot be pressed to the point of impasse (see, for example, *United Brotherhood of Carpenters and Joiners*, [1978] OLRB Rep. Aug. 776). Further, the respondent has no "woods operations". It is engaged exclusively in a transportation business.

37. The applicant's explanation that this expanded recognition clause was necessary in order to provide bargaining unit employees with the requisite job security is without merit. A recognition clause defines a bargaining unit. A job security clause protects the jobs of employees who fit within the definition of the bargaining unit in a recognition clause. Examples of job security clauses are "no sub-contracting of bargaining unit work" and "no bargaining unit work to be done by management personnel" clauses commonly found in collective agreements in Ontario. Although there may be some job security elements to job security clauses, recognition and job security clauses are not at all the same thing.

38. Similarly, the applicant's proposals with respect to a grievance procedure and wages reflect a complete indifference to the respondent's structure. Prior to filing the requisite Schedule D (the proposed collective agreement it is prepared to execute) in this application, the applicant had proposed a grievance procedure which involved taking matters up with a "Division Manager", a "Woods Manager" and a "Vice-President, Woodlands" which the applicant acknowledged the respondent has none of, and then, when the respondent indicated it would not agree to it, no grievance procedure at all, including resiling from the agreement reached between the parties with respect to several other clauses in the grievance procedure article. With respect to wages, the applicant insisted throughout that wages be paid on the basis of an hourly rate, even though it acknowledged that the respondent has always paid its employees on a "trip rate" or piecework basis (except for float and sand truck drivers, self-loaders, and haul truck drivers engaged in miscellaneous hauling or activities other than hauling), and even though its own proposals with respect to "bereavement pay" and "jury duty/supboenaed witness allowance" made reference to piece workers (and which latter two proposals also refer to employees engaged in woods operations which the respondent has none of). The applicant also acknowledged that it has no objection in principle to employees it represents being paid on a piece work basis.

39. In both its evidence and its representations, the applicant repeatedly accused the respondent of "walking out" of negotiations and "refusing to bargain". In particular, the applicant criticized the respondent's reluctance to bargain upon monetary matters. There was no cogent evidence before the Board which suggests that the respondent either "walked out" or otherwise refused to bargain in the manner suggested by the applicant. On the contrary, the evidence demonstrated that it was the applicant which was deaf to the respondent's explanations and entreaties, and was so intransigent in its position that bargaining did not proceed as it might have. In negotiations, the applicant refused to acknowledge that there was a significant difference in the monetary impact on the respondent between a bargaining unit described in the terms demanded by the applicant (see paragraph 32, above) and the bargaining unit described in accordance with the certificate issued to the applicant by the Board, which the respondent was quite prepared to agree was the bargaining unit covered by the collective agreement. Not until the hearing herein did the applicant, through McIntyre, grudgingly acknowledged that it was reasonable for the respondent to want to have an idea of the number of employees in the bargaining unit before dealing with monetary matters. The applicant was unable to offer any reasonable explanation of its insistence upon the expanded recognition clause it proposed. McIntyre kept repeating that this is the standard clause in the applicant's collective agreements and that the applicant felt this would give bargaining unit

employees the requisite job security. We have already noted that a union is not entitled to insist upon a recognition clause, whether "standard" or otherwise, which has the effect of expanding its bargaining rights.

40. The existence of "management" rights clause was another major stumbling block in the negotiations between the parties. Although such provisions do not exist in every collective agreement in Ontario, they are quite common. The applicant insisted that it acknowledged the respondent's right to manage its affairs and that no management right's clause was necessary. It pointed out that, if necessary, the respondent could rely on the residual rights theory of management rights that there is so much arbitral jurisprudence about. In our view, it was not at all unreasonable for the respondent to seek a clause which clarified its management rights, rather than having to rely upon the uncertainties of the arbitral jurisprudence. Certainly, the fact that other collective agreements to which the applicant is a party do not have such a provision, which the applicant asserted is the case, was no reason for the applicant to dismiss the respondent's proposal out of hand.

41. In the result, we were not satisfied that the process of collective bargaining between the parties had been unsuccessful for the reasons set out in subsection 40a(2) of the *Labour Relations Act* and we therefore dismiss the application.

0562-90-G; 0563-90-R United Brotherhood of Carpenters and Joiners of America, Local Union 93, Applicant v. Bernard Normand, **B & M Millwork Ltd.**, and Interior Wood Installations Inc., B. J. Normand (Quebec) Ltée, Respondents

Adjournment - Construction Industry - Construction Industry Grievance - Evidence - Practice and Procedure - Related Employer - Union seeking to adduce evidence concerning what was said during meeting of parties convened by Labour Relations Officer - Evidence ruled inadmissible - Union seeking adjournment in order to call witness - Board denying adjournment on ground that no effort made to secure presence of witness at hearing scheduled in consultation with the parties - Non-union company spinning off numbered company - Numbered company created with knowledge and active agreement of union and entering into voluntary recognition agreement - Statutory preconditions for declaration under section 1(4) of the *Act* met - Board exercising discretion not to issue declaration - Application and grievance dismissed

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members J. Trim and J. Kurchak.

APPEARANCES: S. Waller and Neil Melanson for the applicant; Michael S. Ruddy and Bernard M. Normand for the respondent.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER J. TRIM: April 9, 1991

1. Board File No. 0562-90-G is a referral to the Board of a grievance in the construction industry, pursuant to the provisions of section 124 of the *Labour Relations Act*. Board File No. 0563-90-R is an application for a relief under sections 1(4) and 63 of the *Act*.

2. At the request of the applicant, "B. J. Normand (Quebec) Ltée" was added as a

respondent in both applications at the hearing on January 30, 1991 (the appropriate notices in that respect had been given earlier).

3. At the hearing, the parties agreed that:

- (a) the three corporate respondents; that is B & M Millwork Ltd., Interior Wood Installations Inc. and B. J. Normand (Quebec) Ltee., meet the statutory preconditions for a declaration under section 1(4) of the Act; that is, they carry on associated or related activities or businesses under common control or direction;
- (b) the sole issue between the parties in Board File No. 0563-90-R is whether or not the Board should exercise its discretion under section 1(4) by declaring that the three corporate respondents constitute one employer for purposes of the Act;
- (c) if the respondent B & M Millwork Ltd. is declared to be one employer with the other two corporate respondents the applicant's grievance in Board File No. 0562-90-G should be allowed, the Board should declare that B & M Millwork Ltd. is bound to the provincial collective agreement between the Carpenters' Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America with respect to the industrial, commercial and institutional sector of the construction industry, and that B & M Millwork Ltd. violated that collective agreement, and that the Board should order the respondents to pay \$4,922.41 in damages, for which damages they would be jointly and severally liable;
- (d) if the Board does not find it appropriate to make a section 1(4) declaration with respect to B & M Millwork Ltd. as requested by the applicant, the grievance in Board File No. 0562-90-R should be dismissed;
- (e) the applicant would withdraw the applications as against Bernard Normand.

In addition, the applicant indicated it was not pursuing its application under section 63 of the Act.

4. We note that the applicant elected to not name B. J. Normand Ltd. as a respondent in this proceeding. Notwithstanding that the applicant is therefore not entitled to any relief with respect to B.J. Normand Ltd. in this proceeding, the Board heard a great deal of evidence and argument from the applicant with respect to that company.

5. Before dealing with the merits of the applicant's application under section 1(4), we find it appropriate to set out two evidentiary rulings we made in the course of the hearing.

6. First, the applicant sought to elicit certain evidence with respect to what was said during the course of the meeting between the parties convened by the Board Officer assigned by the Board's Manager of Field Services to try to resolve the matters in dispute between them without a hearing. Upon objection by the respondents, the Board ruled such evidence to be inadmissible. Such settlement discussions are generally privileged. In addition, section 111(6) of the Act contem-

plates the discussions between parties and Labour Relations Officers will be confidential, although it also gives the Board the discretion to allow these to be disclosed in appropriate circumstances. The applicant asserted that the evidence which it sought to elicit related to the credibility of Bernard Normand, a principal of the respondents and their sole witness herein. We were not satisfied either that such evidence was sufficiently cogent or that there was any other basis upon which it was appropriate for the Board to exercise its discretion to permit the evidence to be adduced.

7. Second, after calling its first two witnesses, the applicant requested an adjournment to enable it to call Wilt Clermont, a former assistant business agent of the applicant and whose name had figured prominently in the respondent's evidence, as a witness. The first indication that the applicant had given anyone that it might seek such an adjournment was earlier that same day. The respondent opposed the applicant's request.

8. The applicant submitted that Clermont's evidence was necessary to its case, that the respondent would not be prejudiced by an adjournment, and that no labour relations purpose would be served by not granting one.

9. Both of these applications were filed with the Board on May 24, 1990. They were first scheduled to be heard on June 9, 1990. That hearing was adjourned *sine die* on consent of the parties. Subsequently, the applicant requested that they be scheduled for hearing again. They were so scheduled for October 31, 1990. Again the hearing was adjourned on consent of the parties and the hearing was rescheduled, *in consultation with the parties*, to take place on January 30 and 31, 1991.

10. The applicant indicated that it had always intended to have Clermont available to testify and that it had been in touch with him with respect to the first two hearing dates scheduled in these matters. However, it was not apparent that the applicant had made any efforts to have Clermont present at the January 30 and 31, 1991 hearings. Indeed, apart from knowing that Clermont, who is now retired, is somewhere in Florida, the applicant did not even know where he was, how to contact him, or when, if ever, he might return to Ontario. Consequently, the applicant was unable to say when, if ever, Clermont might be available to testify.

11. In our view, the question was not what labour relations purpose would be served by not granting the adjournment. Rather, what labour relations purpose would be served by *granting* the adjournment? As the Court of Appeal has pointed out, labour relations delayed are labour relations defeated and denied (see *Journal Publishing Co. of Ottawa Ltd. et al. v. Ottawa Newspaper Guild, Local 205, O.L.R.B. et al.*, March 31, 1977 (Ontario Court of Appeal), unreported). As the tribunal constituted to administer the *Labour Relations Act*, the Board must be and is sensitive to the problems of delay in labour relations matters, and the concerns often expressed in the labour relations community in that respect. As the applicant acknowledged, it did not have a right to an adjournment (see *Re Flamboro Downs Holdings Ltd. and Teamsters Local 1879*, (1979) 24 O.R. (2d) 400 (Div. Ct.) in that respect). Accordingly, and as is well known in the labour relations community, the Board will generally refuse to grant an adjournment except on consent of the parties or if it is satisfied that there are exceptional extenuating circumstances (see for example *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441, among many others). Local 93 had long known that Clermont's evidence might be necessary. The applicant had specifically agreed to the January 30 and 31, 1991 hearing dates but had made no reasonable efforts to obtain Clermont's attendance at the hearing, and offered no cogent explanation for its failure to do so.

12. In the circumstances, the Board was not satisfied that there was any cogent basis upon which it was appropriate for it to exercise its discretion in the manner requested by Local 93 and its request for an adjournment was therefore denied.

13. Because the parties agreed that the respondents carry on associated or related activities or businesses under common control or direction, we find it unnecessary to review in detail the evidence which the Board heard in that respect. Suffice to say that Bernard Normand exercises the common control or direction. B.J. Normand Ltd. (which is not a respondent herein) was incorporated in 1961. It has been a signatory to the Carpenters' provincial agreement for approximately 20 years. In the industrial, commercial and institutional ("ICI") sector of the construction industry, it performs dry wall, steel studding, t-bar ceiling and stucco work on a sub-contract basis. It also does some stucco work in the residential sector.

14. B.J. Normand (Quebec) Ltée. was formed in 1976. Since 1981 Bernard Normand has been the sole shareholder and since June 1982 he has been its sole officer and director. This company was incorporated to carry on business in the Province of Quebec and to do the same type of work that B.J. Normand Ltd. does in Ontario. B.J. Normand (Quebec) Ltée. has never done business in Ontario.

15. B & M Millwork Ltd. ("B & M") was incorporated in June 1986. Bernard Normand's wife is its sole shareholder but he is that company's president and directing mind. It is not bound by any collective agreements. The company is in the business of manufacturing (in its shop) and installing millwork (such as kitchen cabinets). Some sixty per cent of its work is in the ICI sector and the balance is in the residential sector. According to Normand, ninety per cent of B & M's work is manufacturing and ten per cent is trucking and installation. Normand purchased the equipment used by B & M from Malcolm Duys in Quebec and persuaded Duys to stay on to manage the company in Ontario until February 1989 when Duys returned to Holland.

16. Interior Wood Installations Inc. (or "Interior") was originally incorporated on March 9, 1989 as 818861 Ontario Inc. On May 8, 1989, it became Interior Wood Installations Inc. It is the circumstances under which what became Interior came into being which are at the core of the dispute between the parties.

17. There is no dispute with respect to a number of the material facts in that regard. In October 1988, Thomas Fuller Construction Co. (1958) Limited ("Fuller Construction") sub-contracted some work to B.J. Normand Ltd. and some other, unrelated, work to B & M on its Cumberland Town Hall project. When the applicant learned of B & M's presence on the job site it filed a grievance against Fuller Construction which is bound to the Carpenters' Provincial agreement which covers such work. The grievance alleged that Fuller Construction had violated the collective agreement by subcontracting work to a non-union employer. The parties stipulated that this grievance was with respect to B & M and its presence on the Cumberland Town Hall job site. Because of the stage of the project, Fuller Construction was anxious to have B & M complete its work if possible. Similarly, B & M wanted to complete the work and the applicant wanted to ensure that the work was done by its members under its provincial agreement. After some discussions between the parties, Fuller Construction agreed to pay \$24,000 to the applicant in settlement of the grievance and Normand caused 818861 Ontario Inc. to be incorporated. This company immediately entered into a voluntary recognition agreement with the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, on its own behalf and on behalf of the United Brotherhood of Carpenters and Joiners of America, and its available bargaining agents (of which affiliated bargaining agents the applicant is one of) and which we will hereinafter refer to as the "EBA". Pursuant to the agreement, the company recognized the EBA and its affiliated bargaining agents as the exclusive bargaining agent for all journeymen and apprentice carpenters, other than millwrights, employed by it in the ICI sector of the construction industry in the Province of Ontario. The numbered company and the EBA also specifically agreed that their agreement constituted a voluntary agreement within the meaning of the *Labour Relations Act* and that the com-

pany would be bound by the Provincial agreement between the Carpenters' Employer Bargaining Agency and the EBA.

18. 818861 Ontario Inc. then completed the installation work which had been begun by B & M on the Cumberland Town Hall job site. To do so, it used three men who had been employed at the job site by B & M and who were accepted into membership by the applicant, and two men referred to it from the applicant's hiring hall.

19. B.J. Normand Ltd. and B & M have been active in the construction industry since that time. The numbered company, or Interior as it is now known, has not been active since it finished work on the Cumberland Town Hall job site in late April or early May 1989. The parties part company with respect to what was intended by the agreement which led to the creation of what is now Interior.

20. Bernard Normand testified that 818861 Ontario Inc. was incorporated in response to the applicant's grievance against Fuller Construction and for the specific purpose of completing the installation on the Cumberland Town Hall job site of millwork manufactured by B & M, which installation work had been begun by B & M. He testified that although the numbered company's agreement with the EBA was for that one job, he later developed the notion that it could be used to install B & M manufactured millwork in other similar circumstances; that is, on other unionized job sites. He caused the numbered company to be renamed Interior because he thought it would be better for business purposes if the company had a name rather than a number. Normand testified that it was his intention and understanding that B & M would be completely unaffected by the arrangement which led to the incorporation of 818861 Ontario Inc. and its agreement with the EBA. He testified that he had expressed his concerns to Clermont and received the assurances he sought in that respect.

21. Claude Cournoyer described himself as a representative of the General President of the United Brotherhood of Carpenters and Joiners of America. As such, he controlled the applicant's affairs from August 1988 to March or April 1990 and was responsible for the filing and resolution of the grievance against Fuller Construction as aforesaid. He was directly involved in making the arrangements for the agreement between 818861 Ontario Inc. and the EBA. Indeed, he signed that agreement on behalf of the EBA. Notwithstanding his direct involvement, Cournoyer's recollection of the grievance was unclear. Indeed, he was unable to recall either what the grievance concerned or even if it related to B & M. He also indicated that he had spoken with Tom Fuller (President of Fuller Construction) with respect to the grievance, which he could not have done since Fuller was out of the country at the time. Nor was Cournoyer able to recall who else he spoke with about the grievance or who he met with at the hearing at the applicant's offices between the parties with respect to the matter. His recollection of what was discussed, either by telephone or at the meeting was similarly vague. However, Cournoyer testified that Clermont did not have the authority to give the assurances Normand alleged he had, and that he understood that the agreement between the numbered company and the EBA meant that the numbered company would do *all* subsequent installation of B & M manufactured millwork, whether on unionized job sites or otherwise. However, he conceded that there was no specific mention of future work in the discussions between the parties and that, at best, he had contemplated that the numbered company would do all installation work on unionized job sites. He also conceded that there was no reason to incorporate a new company if *all* future installation work was to be done under the provincial agreement. Cournoyer claimed to be unaware that 818861 Ontario Inc. had no employees at the time it entered into the agreement with the EBA, or of the arrangement regarding the persons who completed the installation of B & M manufactured millwork on the Cumberland Town Hall job site as employees of the numbered company.

22. Wilfred Chretien was the applicant's business manager during the material times. He is now retired. It is evident from his testimony before the Board that his memory of events in 1989 is flawed. For example, he was unable to make the connection between the grievance against Fuller Construction regarding the Cumberland Town Hall job site and which led to the incorporation of 818861 Ontario Inc., and B & M. In addition he had little direct involvement in the events material to these proceedings and particularly in a pivotal meeting between the parties in March 1989. His testimony both in that respect and generally was vague and confused.

23. William Fuller is the President of Fuller Construction. His testimony with respect to the events surrounding events in February and early March regarding the applicant's grievance with respect to the Cumberland Town Hall job site, and its resolution, was clear and unequivocal. He testified that, in early March 1989, he met with Malcolm Duys and Claude Cournoyer at the applicant's office (he said that Chretien was present part of the time). The purpose of his attendance on behalf of Fuller Construction was twofold: to settle the grievance and to see if an arrangement could be arrived at to allow B & M to complete the work it had begun. Although the formal agreement came later, the grievance was resolved on the basis that Fuller Construction would pay \$24,000 to the applicant and the remaining work would be done in accordance with the provisions of the applicant's provincial agreement. Fuller testified that Cournoyer offered to options with respect to B & M:

- (a) that B & M itself sign a collective agreement (which option was rejected by B & M because it did not want to become bound to a collective agreement); or
- (b) enter into an arrangement whereby B & M's shop and operations on non-unionized job sites would be unaffected but which would enable it to complete its work for Fuller Construction on the Cumberland Town Hall job site.

Although he was not present during discussions regarding the details of how the second option, which was accepted by B & M, would be accomplished, Fuller testified that it was Cournoyer who suggested that a new company could be incorporated.

24. Section 1(4) of the Act provides that:

...

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

...

25. Section 1(4) modifies, for labour relations purposes, the common-law notion of privity of contract and commercial law assumptions based on the separation of legal identities between corporations. It contemplates that the corporate veil may be pierced for purposes of the *Labour Relations Act* in circumstances where two or more otherwise distinct legal entities are engaged in related economic activities under common control or direction such that they should be treated as one employer for purposes of the Act.

26. The purpose of section 1(4) is to preserve the integrity of bargaining rights and collective bargaining from the disruptions which might be caused by changes in corporate form or structure. As a result, collective bargaining rights need not be congruent with the corporate framework.

27. The classic example of the mischief which section 1(4) is designed to remedy is when an employer bound to a collective agreement seeks to avoid the restrictions of the collective agreement by forming another company to carry on essentially the same business (see, for example, *Napev Construction Ltd.*, [1976] OLRB Rep. Mar. 109 (application for judicial review dismissed by the Divisional Court on May 24, 1977, unreported), *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 and Oct. 1353, *Roy Brandon Construction*, [1981] OLRB Rep. Feb. 219 and *Metro Century Construction Ltd.*, [1983] OLRB Rep. July 1122). However, section 1(4) is neither an unfair labour practice nor a “penalty” provision. It also applies to *bona fide* commercial transactions or restructuring which affect established rights under the *Labour Relations Act*, whether the impact thereof is direct or incidental.

28. Like many employers before them, the respondents in this proceeding argued that a trade union should not be allowed to use section 1(4) as a substitute for certification. Indeed, there are a number of decisions in which the Board has indicated that it will not exercise its discretion under section 1(4) in circumstances where it would amount to allowing the trade union to use it as a substitute for certification (see, for example, *Harold R. Stark Ltd.*, [1978] OLRB Rep. Oct. 945, *Acto Builders (Eastern) Ltd.*, [1979] OLRB Rep. June 465, *WMI Waste Management of Canada Inc.*, [1981] OLRB Rep. Mar. 409), particularly where a previous application for certification by the same applicant did not succeed (as in *D. L. Stephens Contracting Niagara Ltd.*, [1978] OLRB June 531), or where there was no evidence of any erosion of bargaining rights (as in, for example, *Ellwall & Sons Construction Ltd.*, [1978] OLRB Rep. June 535 and *Subito Contracting (Drywall & Painting) Co. Ltd.* [1981] OLRB Rep. Oct. 1494).

29. Having regard to the purpose of section 1(4) and for the reasons suggested at paragraph 15 of *Great Atlantic and Pacific Company of Canada Limited*, [1981] OLRB Rep. Mar. 285, we attach little significance to any distinction between an application for certification and a request for relief under section 1(4). There is nothing in the Act which suggests that such a distinction is appropriate. On the contrary, section 1(4) was added to a pre-existing statutory scheme which already included a certification process. It was intended to stand on its own as an independent basis for relief and circumstances for existing bargaining rights for impaired or otherwise threatened by corporate adjustments.

30. The Board’s power under section 1(4) is discretionary. A declaration will not necessarily follow in every case in which its statutory preconditions are satisfied. In exercising its discretion under section 1(4), the Board must consider the purpose of the provision in the context of the case before it.

31. In argument, counsel for the applicant stated that B.J. Normand Ltd. is bound to the Carpenters provincial agreement and that if it had been used to perform the installation work on the Cumberland Town Hall job site begun by B & M and completed by 818861 Ontario Inc., they would have had to do so in accordance with that collective agreement. He pointed out that B & M came to the applicant’s attention as a non-union sub-contractor on a unionized job site and he argued that the installation work in question should have been done under the collective agreement using members of the applicant because Fuller Construction was a unionized contractor and because B & M is related to B.J. Normand Ltd. Counsel suggested that the respondent’s assertion that a declaration under section 1(4) is inappropriate is merely wishful thinking.

32. The applicant’s argument is seriously flawed. There is nothing in the evidence before

the Board which suggests either that B.J. Normand Ltd. has ever performed any installation work of the kind in question here, or that it should have done so on the Cumberland Town Hall job site. In addition, the applicant consciously chose to not make B.J. Normand Ltd. a respondent in these proceedings and there is no agreement or decision of the Board (or anything else) to the effect that B & M and B.J. Normand Ltd. are related in a manner such that they should be considered to be one employer for purposes of the Act or for the purposes of this application.

33. Of the cases referred to in arguing by counsel for the applicant, *Stebill Limited*, [1989] OLRB Rep. Apr. 384, *Eighty-Five Electric*, [1987] OLRB Rep. June 833, *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720, and *Penka Carpentry Limited*, [1985] OLRB Rep. May 711 were not "discretion" cases as such and are of little assistance to us in this case. In *Warren Steeplejacks Limited*, [1989] OLRB Rep. Mar. 309, the Board was urged by at least one of the respondent employers to not exercise its discretion under section 1(4) because doing so would extend rather than preserve the trade union's bargaining rights. Although the Board did find it appropriate to issue the requested declaration in that case, the circumstances were not analogous to those before the Board in these proceedings.

34. The authorities cited for counsel by the respondents were more apposite to the circumstances before us. The Board's decisions in *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844, *Gerald Davidson Plumbing & Heating*, [1984] OLRB Rep. Mar. 462 and *Vallance & Levy Eng. Contractors Ltd.*, Board File No. 2403-83-M, August 16, 1984, unreported), demonstrate that the Board has not found it appropriate to make a section 1(4) declaration in circumstances where a non-unionized company pre-exists a company which is incorporated by the same principal(s) and voluntarily enters into a collective bargaining relationship with a trade union in order to be in a position to perform work on unionized job sites, where there is no common pool of employees (as there was in *Industrial Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029, for example) or interchange of employees between them and there is no indication that work destined for the unionized company has been diverted to the non-union company or that the non-union company has been surreptitiously used on unionized job sites to the detriment of the unionized company and the trade union. It is also evident from the jurisprudence that the Board does not look favourably upon an applicant which seeks a section in a 1(4) declaration after first participating in the very corporate restructuring which is the object of its application.

35. Upon assessing the testimony and the demeanour of the witnesses, we find ourselves unable to give Chretien's evidence any weight except where it is corroborated by other reliable evidence. Similarly, Cournoyer's evidence was unsatisfactory. It was vague, very generalized, and tended to be inconsistent with the objective facts. On the other hand, we found William Fuller to be a very credible and reliable witness. Fuller's testimony supplements and corroborates that part of Normand's evidence which conflicts of the evidence of Conway or which is otherwise challenged by the applicant.

36. On the basis of the evidence before the Board, we are satisfied that the non-unionized B & M pre-existed 818861 Ontario Inc. which latter company was created with the knowledge and active agreement of the applicant. After entering into a voluntary recognition agreement at a time when the newly created company had no employees, 818861 Ontario Inc. and the applicant entered into an arrangement whereby employees of B & M who had been on the Cumberland Town Hall job site became employees of the numbered company and were admitted into membership by the applicant, and two new employees were referred to the company by the applicant from its hiring hall (which suggests that the applicant must have known the numbered company had no employees when it entered into the voluntary recognition agreement). The arrangement between the parties applied specifically to the Cumberland Town Hall job site and, to the extent that it was

considered at all, contemplated at most that the numbered company (now Interior) would do the installation of B & M manufactured millwork on unionized job sites while B & M would operate as before on non-unionized job sites. It was neither the agreement nor the intention of the parties that *all* future installation work would be done by the numbered company (Interior) and it was only the numbered company which the parties intended would be bound by the voluntary recognition agreement entered into by it and the EBA. Although there is some suggestion of it in the evidence, we are not satisfied, on a balance of probabilities, that any work destined for Interior has been redirected to B & M in a manner which has “eroded” or otherwise threatened the applicant’s bargaining rights, or at all. Indeed, we observe that the applicant could adequately protect its bargaining rights in circumstances where Interior operates on a unionized job site by filing the appropriate grievance against the unionized general contractor.

37. In the result, we are not satisfied that this is a case in which it would be appropriate for the Board to issue the section 1(4) declaration sought by the applicant and we decline to do so. The application in Board File No. 0563-90-R is therefore dismissed.

38. Accordingly, and having regard to the agreement of the parties, the grievance in Board File No. 0562-90-G is also dismissed.

DECISION OF BOARD MEMBER J. KURCHAK; April 9, 1991

1. I dissent. In my opinion, the Board should have exercised its discretion and granted the section 1(4) declaration as requested by the applicant.

2. In reviewing the evidence, several issues stand out:

- (a) It seemed that the absence of Wilfred Clermont, the assistant business representative of the Local Union, at the time the Provincial Agreement was signed by B. M. Normand and Claude Cournoyer, was made to be a crucial issue at the hearing;
- (b) A “deal” was said to have been made between W. Clermont, and B. Normand regarding the extent of the Agreement. Was it to terminate at the end of the Cumberland Town Centre project? Was it to extend to only “Union” jobs, or was it to be applied to all ICI projects in the future?

3. In my opinion, I don’t think that W. Clermont’s testimony was particularly needed. If he was to be there to deny B. Normand’s claim that a “deal” was made with him regarding a “one shot deal”, then it would have been of no consequence, since a site agreement is not in accordance with the Ontario *Labour Relations Act*. This aside from the fact that the man had no authority to make deals.

4. The issue of whether the agreement extended to all ICI projects, or exclusively to union jobs in the future, was dealt with by C. Cournoyer, & B. Normand’s partner, Malcolm Days. Of the two, only Cournoyer was at the hearing as a witness. Although his memory was bad, the probability is slim indeed that he agreed to, or suggested a double-breasted operation. His testimony that the Agreement was signed to cover all future installations is consistent with normal practice in the industry as I have known it over many years. Then again, of course, W. Clermont is the one who was supposed to have made the “deal”. Cournoyer suggested the “second option” of using a numbered company, to appease Malcolm Days’ concerns about the agreement extending to his “shop” work. This constituted about 90% of B & M Millwork’s operations.

5. On the question of future "union" jobs, the issue becomes hazy. Whether the agreement covers those projects seems somewhat lost at this point. The respondents *did* acknowledge that at least *this* work was covered, in this reply to the 1(4) application. In paragraph 9 of their Schedule "A" it states:

...was accordingly agreed that in the future, and to avoid the same type of difficulties which arose on the Town Hall project, whenever B & M Millwork Ltd. was engaged on a project on which members of the Union were required to be employed as directed by the General Contractor or otherwise, the said work would be carried out by 818861 Ontario Inc. with unionized labour in accordance with the Carpenters Provincial Collective Agreement. B & M Millwork Ltd. and 818861 Ontario Inc. and its successor Interior Wood Installations Inc. have complied with its agreement with the Applicant in all respects. *The Applicant ought not now be permitted to undermine the agreement arrived at and ought to be compelled to honour its obligations under the agreement arrived at.*

[my emphasis added]

6. The current grievance against the Respondents, lodged by Local 93, deals with work performed *on a union job* at the Lord Elgin Hotel. This is with Dillan Construction, a General Contractor under agreement with the Carpenters' Provincial Council. A settlement of \$4,922.41 was reached by the parties to resolve the grievance. A section 1(4) declaration will determine whether or not it will be paid.

7. Further, I believe that there were extenuating circumstances that should be considered in this determination. C. Cournoyer was appointed as a Trustee to take charge of the Local. This, in itself, indicated trouble. He discharged W. Clermont, (the missing witness) who was an officer of the Local for thirteen years. W. Clermont was re-instated, by action of the membership, six months later. Such internal disruptions can only have a serious affect on how a union functions. The consequences could be serious if external problems are not properly addressed. A lack of proper response to labour-management related issues could be detrimental to the membership and to the industry concerned. In the case at hand, B & M Millwork, a non-union carpentry sub-contractor was on a union project for about three months before action was taken. My experience tells me that something indeed was wrong. This, particularly in view of the fact that *B. J. Normand Limited*, a union contractor under the Carpenters' Provincial Agreement, was engaged on the same project. A section 1(4) application was in order, and I believe, would have been successful if properly processed.

8. I believe that all of this should be taken into consideration. In my opinion, from a practical labour-relations point of view, the Board should have exercised its discretion under section 1(4) of the Act, by declaring that the (three) corporate respondents constitute one employer for purposes of the Act.

1825-90-R; 1827-90-U Retail, Wholesale and Department Store Union, AFL:CIO:-CLC:, Applicant v. **Call-a-Cab Limited**, Respondent v. Group of Employees, Objectors; Retail, Wholesale and Department Store Union, Complainant v. **Call-a-Cab Limited**, Respondent

Certification - Dependent Contractor - Discharge - Discharge for Union Activity - Interference in Trade Unions - Intimidation and Coercion - Remedies - Unfair Labour Practice - Union applying to represent unit of dependent contractors of respondent taxi service - Taxi Service terminating 11 of 22 dependent contractors - All 11 signing union cards shortly before termination - Board finding terminations tainted by anti-union animus - Reinstatement with compensation and posting ordered - Board reviewing history, rationale and appropriateness of Board ordered postings - Certificate issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *K. Davies* and *R. Sloan*.

APPEARANCES: *Robert McKay* and *Jim Pound* for the applicant/complainant; *John H. McNair*, *Mike Donnelly* and *Jim Donnelly Jr.* for the respondent; no one appeared at the hearing for the objectors.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER K. DAVIES;
April 10, 1991

1. The name of the respondent in both of the matters herein is amended to "Call-a-Cab Limited".
2. Board File No. 1825-90-R is an application for certification. Board File No. 1827-90-R is a complaint, under section 89 of the *Labour Relations Act*, alleging that the respondent employer has breached sections 64, 66 and 70 of the Act.
3. The applicant/complainant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, and to the Board's decisions in *Hamilton Yellow Cab Company Limited*, [1987] OLRB Rep. Nov., 1373 and *U-Need-A Cab Limited*, [1989] OLRB Rep. Dec. 1275, the Board finds that all dependent contractors of the respondent in its taxi service working in the City of Peterborough save and except supervisors, those above the rank of supervisor, dispatchers, call takers, maintenance staff, office and clerical staff and multi-car/multi-plate owners/lessees, constitute a unit of employees of the respondent appropriate for collective bargaining. For the purpose of clarity, the Board declares that dependent contractors are those persons who are single car/plate owner/lessees of the respondent.
5. The material filed by the respondent and the membership evidence filed by the applicant/complainant, standing alone, indicates that fewer than forty-five per cent of the employees in the bargaining unit at the material times support the application for certification herein. However, the applicant/complainant has challenged the list of employees. Originally, it asserted that Brad Cowie, Joseph Sullivan and Peter Donnelly should not be included on the list. At the hearing, however, the applicant/complainant agreed that these three individuals should be counted as employees in the bargaining unit for purposes of the Board's considerations herein. However, the applicant/complainant also asserted that eleven individuals whose employment had been terminated by the respondent on either October 9 or 10, 1990, should be included on the list of employ-

ees because the terminations were contrary to the Act. In the section 89 complaint herein, the same eleven terminations are alleged to have been contrary to the Act.

6. The respondent agreed that any employee who the Board found had been improperly terminated should be treated as an employee in the bargaining unit for purposes of the applicant of certification herein.

7. We note also that there were three statements of desire or “petitions” filed with the Board in opposition to the application for certification. These bear the names and signatures of seven different individuals. However, no one attended at the hearing on behalf of the Group of Employees, Objectors and the Board has no evidence before it regarding the origination or circulation of these statements of desire. Accordingly, they can be given no weight. (We observe that the statements of desire would not likely have been relevant to the Board’s considerations anyway, since none of the names on them overlap with the names of employees in the bargaining unit who had previously signed one of the applications for membership which the applicant has submitted in support of its application - see, for example, *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138.)

8. The respondent is a company which is in the transportation business in Peterborough. A significant part of its business is a taxi service it operates under the Call-a-Cab name. Immediately prior to October 9, 1990, it operated a fleet of thirty-seven active taxi-cab vehicles. Of these, fourteen were company-owned vehicles driven by non-dependent contractor employees of the respondent. These employees are not in the bargaining unit with respect to which the application for certification herein has been made. The remaining twenty-three vehicles were owned and operated under the respondent’s name by dependent contractors engaged by the company. It is this latter group for whom the applicant seeks to be certified herein.

9. In addition to the vehicles themselves, the respondent’s taxi-cab operation includes a general office, a dispatch office, a service garage, and fueling facilities, all of which are located in the same general area in Peterborough. It is said to be a “family business”. Jim Donnelly Sr. and his father founded the business in 1948. Jim Donnelly Jr., who lives in London where he is the President of About Town Transportation Limited, is part of the respondent’s management team. He acts as a kind of Chief Executive Officer and, as such, is responsible for the respondent’s overall strategic financial and business planning, including any technological change. His brother, Mike Donnelly, is the respondent’s general manager. He was described as the respondent’s Chief Operating Officer in charge of the company’s day-to-day operations. Two other Donnelly brothers and two brothers-in-law are also involved with the company.

10. The respondent has taxi-cab vehicles on the road twenty-four hours a day, seven days a week. The company-owned vehicles are on the road constantly, except when they require maintenance. The respondent pays all of the expenses associated with operating the taxi-cabs it owns. These include the drivers’ wages (forty per cent of the gross fares they collect), licensing fees, insurance, fuel, and maintenance and repairs. The expense of dispatching these company-owned taxi-cabs is also borne by the respondent. The dependent contractors, on the other hand, pay all of the costs associated with operating their vehicles. They also pay twenty per cent of their gross fares to the respondent and a dispatch fee, in return for the use of the respondent’s dispatch services and top lights.

11. Prior to September, 1990, the respondent had several sources of revenue:

- (a) its taxi-cabs;

- (b) a school bus service it operates;
- (c) what was referred to as a "combined urban service" which it operated under contract with Canada Post.

12. The respondent's taxi-cab revenue consisted of general passenger revenue (including the payments it received from the dependent contractor owner operators who are the subject of this application), and contracts with School Boards (separate from the school bussing service) and Canada Post (separate from the combined urban service contract).

13. The combined urban service contract involved the movement of mail and mail products from street box to post office and of mail from post office to carrier box. It also included the "Priority Post" parcel delivery service and other miscellaneous items. The respondent operated this service under contract from Canada Post from 1983 to August 31, 1990. The respondent's contract was terminated effective August 31, 1990 when its tender for the following contract year was not accepted.

14. The respondent had set up what was, in effect, a separate division, called Donnelly Delivery, to perform the Canada Post combined urban service contract. This division used company owned vans driven by employee drivers. When the respondent "lost" this contract, it terminated the employment of these drivers and sold off the vans.

15. The respondent presented evidence that the loss of the combined urban service contract represented a loss of gross revenue amounting to approximately \$200,000.00 per year. The respondent asserted that the loss of this reliable cash flow would have a serious impact on its business. The respondent also presented evidence that its general taxi-cab gross revenue and its taxi-cab gross revenue under the School Board contracts for taxi cab services were significantly down in September 1990 as well. Jim Donnelly Jr. testified that all of this became apparent in the last week of September 1990. He testified that this was consistent with the trend across North America (except Ottawa) and that, as a result, he determined that it would be necessary to decrease the size of the respondent's taxi cab fleet by ten vehicles in order to maintain the strength of the respondent's business. Jim Donnelly Jr. testified that the respondent chose to accomplish this by terminating the services of the dependent contractor owner operators rather than of its non-dependent contractor employee drivers or some combination of the two. He explained that the respondent has greater control over its company cars and their drivers, that the company keeps one hundred per cent of the revenue generated by its own cars but receives only twenty per cent of the dependent contractors fares, and that technological changes it was making to its dispatch system had met with some resistance from the dependent contractor owner operators.

16. Jim Donnelly Jr. testified that the decision to reduce the fleet by ten cars and the selection of dependent contractors whose services were terminated were made on October 7 and 8, 1990 (which was Thanksgiving weekend) and implemented on October 9 and 10, 1990. He testified that the respondent wanted to act quickly in order to minimize the disruption to its business and to preempt any possible loss of business to terminated dependent contractors who might wish to join a competitor or even set up their own company. The selection of the dependent contractors to be terminated was made by Jim Donnelly Jr. on the basis of information supplied to him by his brother, Mike Donnelly.

17. Jim Donnelly Jr. testified that he selected *Lloyd Pedwell* because his driving hours were erratic, his dress and deportment were below standard, the respondent had received several customer complaints about him, and he was believed to have approached a competitor company about working for it. *Brenda Wilson* was selected because she was behind in her payments to the respon-

dent, she was below standard in her presentation and deportment, and she was involved in a domestic triangle involving two other dependent contractor owner-operators, Walter Hanna and Marie Hough. *Bob Pearson* was terminated because it was felt his first priority was a full time job he held with Sir Sanford Fleming College, he was a "weak link" who might leave anyway, and the respondent wanted to reduce the number of calls being taken by dependent contractor owner operators. *Marie Hough* was chosen because Jim Donnelly Jr. felt her first priority was a country postal route she had, she might be inclined to leave to a competitor, and "she was taking more from the company than she was giving to it". *Peter* (also known as "Alex") *Larochelle* was selected because he was erratic in his availability, he was rude to the respondent's dispatcher and to customers, the inside of his car was messy, he was behind on his payments to the respondent, and it was suspected that he was linked to illicit drugs. *Mike Del Grande* was picked because he was a leader of the opposition to the changes to the dispatch system, he was "inflexible" with customers, and he was considered a likely candidate to leave anyway. *Gary Cummings* was said to be a complainer who was erratic in his work habits, had expressed interest in leaving the respondent to join a competitor, and he was behind in his payments to the respondent. *Walter Hanna* was selected because he was behind in his payments, his dress and deportment were poor, and the respondent had received complaints (three in three years) that he had made "suggestive" comments to female passengers. *Mike Paetzold* and *Randy McCaugherty*, who shared a single car, were taking too much business. *John Cummings*, a recent addition who was then on lay-off on a full time job and had another part time job, was selected because he wanted to work only during the busy Friday and Saturday night periods.

18. The nature of the applicant/complainant's allegations is such that, pursuant to section 89(5) of the *Labour Relations Act*, the burden of proof is on the respondent to establish that it did not act in a manner contrary to the *Labour Relations Act*. It is not necessary for the respondent to establish that it had just cause for terminating the services of the grievors or any of them. It must, however, satisfy the Board, on a balance of probabilities, that its treatment of the grievors was free of any improper motive. The nature of allegations such as those made in this proceeding is such that the Board must usually adopt a process of inferential reasoning to assess the propriety of a respondent's conduct in the context of all the relevant circumstances, including the objective reasonableness of the respondent's explanation, the existence of trade union activity and the respondent's knowledge thereof, the existence of any pattern of activity indicative of a refusal to recognize the rights under the *Labour Relations Act*, unusual conduct by the respondent after it became aware of trade union activity, and any other "peculiarities" (see, for example, *John T. Hepburn Limited*, [1985] OLRB Rep. Jan. 75, *Manor Cleaners Ltd.*, [1982] OLRB Rep. Dec. 1848, *Hallowell House Ltd.*, [1980] OLRB Rep. Jan. 35, *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745, *De Vilbiss (Canada) Ltd.*, [1975] OLRB Rep. Sept. 678).

19. The respondent denied that it had any knowledge of any trade union activity by or with respect to its dependent contractor owner operators until after it had decided to terminate the services of the grievors. Jim Donnelly Jr. testified he was unaware of it until he was advised of the Board's notice of the application for certification herein. Mike Donnelly said he first heard of it on October 10, 1990 when Al Moncur (an employee in the bargaining unit who was not discharged) volunteered to him that "he had nothing to do with the union". The only direct evidence to the contrary before the Board in that respect is with respect to an alleged telephone call from Darlene Belair to Mike Donnelly.

20. Peggy Immel is the daughter of Jessie Morton, an employee in the bargaining unit for which the applicant/complainant seeks to be certified herein. During the summer Immel works in a lawn care and maintenance business. During the five years prior to October 1990 she had worked as a driver for one of the dependent contractor owner operators from approximately the second

last week of October to April of the following year. On October 11, 1990, Immel learned that she would be unable to drive a Call-a-Cab taxi as she had for five years previously because of the respondent's decision to not allow more than one driver for each taxi-cab owned and operated by a dependent contractor. It was then that she approached the applicant/complainant and told the trade union about a visit that she had received from Darlene Belair on October 5, 1990.

21. Darlene Belair is an employee in the bargaining unit for which the applicant seeks bargaining rights. To the extent that the Group of Employees, Objectors participated in these proceedings, Belair was their representative.

22. In their testimony, Immel and Belair agreed that Belair went to Immel's home early one evening (Immel said that this occurred on Friday, October 5, 1990, and Belair said that this was on Saturday, October 6, 1990). They agreed that Belair was there for some time and had a discussion with Immel after which Belair telephoned Mike Donnelly. However, they disagreed on what they discussed and on what Belair said to Mike Donnelly. Immel testified that Belair came to her home looking for the former's mother (Jessie Morton) and that Belair spoke of there being "talk of a union" and of her hope that she and Morton could persuade other "drivers" to "not go union". Immel testified that Belair used her telephone to call Mike Donnelly and that during this telephone conversation Belair told Mike Donnelly that there was "union talk going around", that she had been approached by a "couple of drivers" in that regard, that there had been meeting to organize a union, and that "Mike, car number 55, Alex and Tom and a few others" were involved. Immel testified that Belair then left but that as she was leaving she said she felt better now that Mike Donnelly knew and said "I was never here, we never had this conversation".

23. Belair denies that there was any mention of a union or of union activity in either her conversation with Immel or her telephone conversation with Mike Donnelly. She testified that she went to Immel's house to speak with the latter's husband, Darrel, regarding the possibility that he might drive a taxi-cab owned and operated by her friend Linda Bradley, (also an employee in the bargaining unit herein) while Bradley was off sick for a month. The latter testified that she had already discussed that matter with Darrel Immel, who apparently worked as a non-dependent contractor employee driver for the respondent during the winter, and with Mike Donnelly and that she wanted to get the matter straightened out. Belair testified that Peggy Immel was home and that Darrel Immel wasn't when she arrived. She said that while waiting for Darrel she chatted with Peggy about the respondent company, the taxi-cab business, and the new computer dispatch system being proposed by the respondent. She testified that she told Peggy how upset she was about this and got sufficiently worked up that she wanted to call Mike Donnelly to tell him so. She admitted she called Donnelly but denied saying anything about a union. She said she identified herself to Mike Donnelly, told him she was "cheesed off" about the computer and the friction it was causing among drivers, that she wanted no part of the expense associated with it, and that she had signed a petition against the computer dispatch system. She also said that, in response to his question, she told Mike Donnelly that she, Bradley, Mike Del Grande, Alex and Tom were involved with the petition against the computer dispatch system. Belair denied knowing anything about a union organizing campaign until sometime later when she read the Board posting in that respect.

24. Because Darrel Immel did not testify, the Board does not have the benefit of his testimony with respect to the content of the disputed telephone conversation between Belair and Mike Donnelly.

25. In assessing the conflicting testimony of Peggy Immel and Darlene Belair, we have taken into consideration that neither are completely disinterested with respect to the outcome of

these proceedings. Peggy Immel was clearly annoyed that she would be unable to drive a Call-a-Cab taxi this winter as she had in previous winters and only approached the union with respect to Belair's visit to her home after she learned of this. In addition, she has demonstrated her allegiance to the applicant by participating in an "information picket" of the Ministry of Labour's office in Peterborough with respect to the terminations complained of herein, and she indicated her belief that the applicant might yet assist her with obtaining work with the respondent. On the other hand, Belair has clearly demonstrated her opposition to the applicant and its application for certification herein. Upon assessing the testimony and their demeanour, we find that Belair was more candid and forthcoming than Immel. Belair was also more clear and more certain in her testimony. Further, we find that Belair's version of the events in question is more plausible than Immel's, notwithstanding that she never did (on the evidence before the Board) speak to Darrel Immel about driving Bradley's taxi-cab.

26. There is nothing in the evidence before the Board which suggests that Belair was aware of the applicant's organizing campaign before she saw the Board's notices with respect to the application. It is also clear from the evidence that the proposed introduction of a computer and associated duplex communication dispatch system had encountered significant opposition from the dependent contractor owner operators and that Belair herself felt very strongly about it. It makes more sense that Belair went to the Immel residence for the reasons she described than for the reasons Immel described. Belair did not really know Jessie Morton and had no real reason to be looking for her that weekend, and, as Peggy Immel herself admitted, Belair did not know or socialize with Peggy Immel. In these circumstances, it would make little sense for Belair to say the things Immel says she said to her, a virtual stranger, or to Mike Donnelly in front of Immel and her husband when, if one accepts Peggy Immel's version, Belair knew it was something she ought not to be doing. Finally, it was clear before the applicant closed its case that the respondent intended to call Belair in reply and indeed the applicant/complainant specifically agreed it could do so. Accordingly, to the extent that an inference can be drawn from the failure of Darrel Immel to testify, it must be drawn against the applicant since as a person who, according to Peggy Immel's version, was present at all material times, he could reasonably have been expected to call to corroborate her testimony. The applicant offered no explanation for not calling Darrel Immel.

27. In the result, we prefer the evidence of Belair to that of Peggy Immel and we find, on a balance of probabilities, that the conversation between Belair and Immel, and the telephone conversation between Belair and Mike Donnelly took place as described by Belair.

28. There is therefore no direct evidence before the Board that the respondent was aware of the applicant/complainant's organizing activity before receiving notice from the Board of the application for certification herein. Of course, that does not necessarily mean that the respondent had no knowledge or suspicion of trade union activity among its dependent contractor employees.

29. In that respect, we find it worth noting that *all* of the grievors had signed an application for membership in the applicant/complainant just days before they were discharged while only three of the eleven bargaining unit employees who were retained had done so. This and the timing of the terminations may be a coincidence, but the respondent's explanation in that respect merits careful scrutiny. If *any* part of the respondent's motivation for its actions was related to the attempt by the grievors to exercise their rights under the *Labour Relations Act*, those actions were improper. As the respondent conceded, the onus was on it to explain and justify the terminations, not in any "just cause" sense, but in the sense that they were unrelated to any activity protected by the Act.

30. As indicated above, there is evidence before the Board regarding the respondent's eco-

nomic situation at the material times, the reasons why it perceived that a fleet reduction was necessary, and why the grievors were the ones terminated. Upon reviewing this evidence, however, we are not satisfied, on a balance of probabilities, that the terminations were completely objectively justified. There is no doubt that the respondent was entitled to make decisions it felt were appropriate, including cutting back its operations. That, however, is not the issue. The issue is whether any part of the motivation for its actions was contrary to the Act.

31. The respondent insisted on comparing the *gross* income it received from the taxi-cabs it owned and operated to the *net* income it received from the dependent contractor owned and operated vehicles. Indeed, all of the income figures provided by the respondent are in *gross* rather than *net* amounts. There was no attempt to quantify the expenses associated with the respondent's operations. While gross income figures suggest something of the respondent's economic situation, surely net figures would be the best indicator in that respect. The respondent offered no reason for not providing net figures.

32. Further, we are not convinced that the loss of the Canada Post combined urban service contract merits the emphasis given it by the respondent. We appreciate that that contract was a bit of a "cash cow" which made a real contribution to the respondent's cash flow. However, there was no indication of the contract's contribution to the respondent's bottom line and we are not satisfied that the loss of that contract and its contribution justified a response in other areas of the respondent's operations. The combined urban service contract was performed by what was, in effect, a separate division of the respondent. When it was lost, the respondent wound up that division and relieved itself of the expenses associated with operating it. Similarly, although the taxi-cab fares from the respondent's School Board contracts were down some twenty percent from September 1989, this amounted to only thirty dollars per day (gross) in real terms.

33. Even if some reduction of the respondent's taxi fleet was justified, the respondent failed to provide a satisfactory explanation for its determination that it was appropriate to reduce its fleet by ten vehicles. The only explanation offered by the respondent are its figures. These reveal that its gross revenue in September 1990 was down some sixteen percent compared to September 1989 but that it reduced its fleet by some twenty-seven percent. The respondent did not explain why a reduction by more than sixteen percent of its fleet (which would have been some six vehicles) was merited.

34. Even if a reduction of the fleet by ten vehicles was justified, the evidence falls short of justifying the decision to do so by terminating only dependent contractor owner operators, or the selection of the grievors in that respect.

35. The respondent offered no real cost/benefit comparison, in terms of either gross or net figures, or any other objective basis, between its non-dependent contractor drivers who operate company-owned vehicles and its dependent contractor owner operators. What evidence there is in that respect raises as many questions as it answers. For example, the evidence reveals that the respondent receives twenty percent of the dependent contractors' gross fares and charges them a fee for its dispatch services. It appears therefor that the twenty percent which the respondent receives from its dependent contractor employees is net profit in its hands. There is nothing in the evidence to suggest it is not. Although it is true that the non-dependent contractor drivers remit one hundred percent of their gross fare to the respondent, all of the expenses associated with operating the company-owned vehicles are borne by the respondent. These include the wages paid to those drivers (which by itself amounts to forty percent of their gross fares), and all of the operating expenses. On the evidence before the Board, it is not possible to compare the relative contributions of the two groups of drivers to the respondent's bottom line.

36. It also appears that, prior to October 1990, the respondent had historically engaged approximately one and two thirds dependent contractor owner operator taxi-cabs for each company-owned vehicle it operated. After the fleet reduction that ratio became less than one-to-one. Why this fundamental change in emphasis was necessary or appropriate was not satisfactorily explained. The respondent did indicate that it felt it has more control over the drivers of its own vehicles. It may be that the respondent has in fact exercised more control over them but it is evident that it had equal control over the dependent contractor owner operators if it cared to exercise it. The evidence suggests no reason why the respondent could not exercise such control.

37. Fifth, what are the reasons for selecting the grievors to be terminated? It is clear that but for the economic difficulties the respondent asserts it was experiencing in September and early October 1990, none of the grievors would have been terminated. It is also clear that opposition to the new dispatch system was not determinative of the selection. Otherwise, Darlene Belair, who was as vehement in opposing the change as anyone, and Lynda Bradley would have been terminated as well. Further, the evidence does not establish that all of the grievors were opposed to the introduction of a computer-assisted duplex channel dispatch system, either strongly or at all.

38. The respondent failed to explain why the eleven grievors were selected rather than the eleven bargaining unit employees who were retained. It is true that three of the eleven retained are family members which may well explain their retention. But what of the other eight? The respondent did offer reasons for the selection of the eleven grievors but offered no reasons or explanation for how it distinguished between them, or any of them, and the eight non-family member bargaining unit employees who were retained. Not only is the lack of evidence in that respect disturbing, but, what evidence there is suggests that the criticisms of the grievors could also be made of at least some of those who weren't terminated. For example, it appears that the failure of dependent contractor owner operators to remit their twenty percent payment to the respondent in a timely manner has been a widespread and chronic problem, and that the opposition to the introduction of the new dispatch system was also widespread. Other reasons or criticisms, such as those with respect to dress or deportment, erratic availability, and customer complaints were so vague and generalized that they are inadequate to explain the respondent's decisions. Nor is it apparent that the nature or number of customer complaints with respect to some of the grievors were outside of what was normal in the industry in Peterborough or how the grievors' complaint records compared to those of bargaining unit employees who were retained.

39. The respondent's explanation for its decisions to terminate Pearson, John Cummings, Hough, Paetzold and McCaugherty were particularly weak. Pearson was selected because the respondent determined, without speaking with him, that his first priority might be elsewhere and he drove only part time. Similarly, John Cummings wanted to work only during the busy Friday and Saturday night periods. In the absence of some explanation to the contrary it would seem that Pearson and John Cummings would have fit nicely into a more streamlined operation; that is, available to help out during peak weekend periods but not seeking a piece of the available business during the slower periods. Hough was chosen because the respondent felt, without discussing it with her, that she had other priorities and that in some unexplained way she was taking more than she was giving to the respondent. Paetzold and McCaugherty were chosen because they were too efficient in their operation of the single car they share. This appeared to be in direct contrast to the erratic behaviour the respondent criticised some of the other grievors for. Similarly, several of the grievors were selected because they had expressed interest in going to a competitor. First, this was nothing new. Second, if the taxi industry in Peterborough, and elsewhere, is in recession, where would they go? Third, would terminating them not precipitate the very thing which the respondent feared; that is, that they would take with them some of the respondent's customer base?

40. In the result, we are not satisfied with the respondent's explanation for terminating the eleven grievors, all of whom signed membership documents indicating their support for the applicant/complainant herein shortly before they were terminated. On the basis of the evidence before the Board, we were not satisfied that the respondent's actions were objectively reasonable in the circumstances and we find it appropriate to infer that the grievors were terminated because the respondent knew or suspected that they were exercising their rights under the *Labour Relations Act* to join a trade union. While we do not suggest that there were no objective reasons to reduce the number of taxi-cabs or select the grievors for termination, we are satisfied that the respondent's decisions in that respect were tainted by improper considerations.

41. Sections 64, 66 and 70 of the Act provide that:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

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66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

• • •

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

42. We are satisfied that the respondent has improperly interfered with the selection of a trade union by its dependent contractor owner operator taxi-cab drivers, contrary to section 64 of the Act. We are further satisfied that part of the respondent's motivation for refusing to continue to employ the eleven grievors herein was that they had become members of the applicant/complainant or because they were exercising their rights under the Act, contrary to subsection 66(a). We are further satisfied that the conduct of the respondent would have had an intimidatory or coercive effect of the dependent contractor owner operators employed by the respondent who were not terminated, contrary to section 70 of the Act.

43. In his dissent, our colleague Board Member Sloan is critical of the use by the Board of

notices which employers are sometimes directed to sign and post, both generally and specifically in this case. We note that the respondent did not challenge the Board's authority to require such a posting. Indeed, it addressed no argument whatsoever in that respect. Nevertheless, our colleague's dissent is such that we find ourselves constrained to deal with it as an issue.

44. Section 89(4) of the *Labour Relations Act* provides that:

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(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

• • •

The Board has exercised its broad remedial authority under section 89 to fashion remedies to many diverse situations.

45. In that respect, the Board has long recognized that the reinstatement of employees discharged contrary to the Act with compensation for lost wages will not, by itself, always constitute a sufficient remedial response. In an effort to more adequately remedy wrongs it has found, the Board has developed various ancillary forms of relief, including the posting of notices by an employer employees are advised that their employer has been found by the Board to have breached the Act and, in some cases, contains assurances by the employer that it will comply with the Act in the future. The use of such notices as a remedy was examined by the Board in *Radio Shack*, [1979] OLRB Rep. Dec. 1220; application for judicial review (c.f. *Re Tandy Electronics Ltd. and United Steelworkers of America et al*) dismissed 80 CLLC ¶14,017 (Ont. Div. Ct.); application for leave to appeal to Court of Appeal dismissed March 10, 1980, unreported) as follows:

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90. These findings bring us to the issue of remedy. What remedies are available to the Board and appropriate in this case? The Complainant has asked for a declaration, a posting of notices, access to employees and their addresses, damages, the imposition of a collective agreement and, as an alternative to the imposition of an agreement, a bargaining order. In requesting these remedies, the Complainant raised some fundamental concerns over the effectiveness of the Board's

bargaining order as an almost exclusive remedy in respect of breaches of section [15]. On the other hand, the Respondent took the position that the Board lacked the jurisdiction to impose an agreement and argued that much of the earlier conduct complained of was irrelevant to any matter now before the Board.

91. Section [89](4) is the section of the Act under which remedies of the kind relevant to this case are made. Its very open-minded wording presents this Board with both the greatest opportunity to fashion carefully tailored effective remedies and the greatest temptation to exceed proper statutory bounds. The Solomonic difficulty in applying the broad powers granted to the Board under this section are apparent from the words used.

“[89](4)... where the Board is satisfied that an employer,... has acted contrary to this Act it shall determine what, if anything, the employer,... shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, any one or more of,

- (a) an order directing the employer,... to cease doing the act or acts complained of;
- (b) an order directing the employer,... to rectify the act or acts complained of; or
- (c) an order ... to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer,..."

92. Guidance, however, can be gained from a number of first principles that are apparent from the structure of the legislation and that have evolved through experience with the section. Moreover, because of the breadth of the requested relief in the instant case and because one such principle has been severely challenged by the Complainant, the Board has decided to review its approach to unfair labour practice remedies and to explain more fully its role in these matters.

93. It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop “boiler plate” remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. *To be effective, remedies should be equitable, they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation.* Remedies should so be sensitive to the interests of innocent bystanders. This means then that the Board should try and tailor remedies to each particular case. It is equally true, however, that the Ontario Labour Relations Board cannot police the entire labour relations arena. As important as it is for this Board to safeguard the substantive rights it administers, ultimately, compliance with the Act depends on the vast majority of unions and employers according at least minimal respect to the legislation, the Board and the Board’s directives. With its limited resources and the time that must be taken to adjudicate fairly issues of controversy, the Board must rely on the co-operation of employers and trade unions in the day to day administration of the Act. For this reason, the Board cannot get too far ahead of the expectations of the parties it regulates. It must be concerned that its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible. It has therefore been said that the ideal Board order must be both an instrument of education and regulation. See generally St. Antoine, *A Touchstone for Labor Board Remedies* (1968), 14 Wayne L. Rev 1039 Ross, *Analysis of Administrative Process Under Taft-Hartley*, [1966] Lab. Rel. Yearbook 299. Giving effect to these general considerations, three basic principles that underpin section [89] have emerged.

(1) A Remedy is Not A Penalty

94. If deterrence was all that the Board had to keep in mind, it would be a simple matter to set

up a system of penalties which would achieve this end. There is little doubt that penalties could be devised which would provide second thoughts to anyone intent on violating *The Labour Relations Act*. But the Legislature did not provide the Board with this role and probably with good reason. See *Little Bos. (Weston) Limited* [1975] OLRB Rep. Jan. 83, at 91. Section [96] of the Act is a section that sets out penalties for contraventions of the legislation and allocates the role of applying these penalties to the Provincial Court. Additional penalties may exist elsewhere in appropriate situations. See *Criminal Code*, R.S.C. 1970, c. C-34, s. 5, 423(2)(a); *Re Regina v Gralewicz et al* (1979), 45 C.C.C. (2d) 188 (Ont. C.A.) By implication, and by the absence of punitive language elsewhere in the statute, it is reasonable to conclude that *the Board should not fashion its remedies under section [89] with the primary view of penalizing parties. This is not to deny that effective remedies will likely have a deterrent effect, but the primary purpose of a remedy should not be punishment.* If it were otherwise, the Board's accommodative and settlement role under section [89] and more generally would be a most difficult one to maintain. Offenders would be wary of compromise lest their condor be subsequently met by stiff penalties issued by the very agency that encouraged an informal and early resolution of a complaint. Indeed, settlement and compromise might have to give way to a public clamor for a more tangible enforcement of the legislation not unlike the current concern over plea bargaining in the criminal law context. Labour law has historically been more interested in accommodation than "two-fisted" enforcement. But of course, the failure to comply with a Board order can result in the application of penalties by the Court in the exercise of the Court's contempt jurisdiction.

95. In the immediate case this principle has importance. For example, *affirmative orders that an employer post notices indicating that he has violated the Act and directives that he publicly commit himself to future compliance with the legislations cannot have as their purpose public humiliation, embarrassment and, thereby, punishment.* These remedies may be appropriate as might direct trade union access both to employees on an employer's time and to employee addresses, but only as directives aimed at the removal or rectification (to use the language of the statute) of the consequences of a violation. *These types of remedies, and their nature is almost infinite, should have as their purpose the amelioration of the lingering psychic effects of unfair labour practices and the consequent injury to a union's organizational or bargaining strength.* The jurisprudence developed by the National Labour Relations Board is replete with other examples and demonstrates the great potential for developing affirmative labour relations remedies under Section [89]. See McDowell and Huhn, *NLRB Remedies for Unfair Labour Practices*, Wharton School of Finance, Univ. of Pa. (1976). However, the Board must consider the appropriateness of each remedy in a Canadian context and in the light of our own statutory framework. For example, *quare* the application of certification extension in Ontario; *Mar-Jac Poultry* (1962) 136 NLRB 785.

[emphasis added]

The Board went on in that case to order the respondent, not only to sign and post a Board notice, but also to sign and mail it at its own expense a copy of the notice to the residence of each bargaining unit employee and also to publish at its own expense a signed copy of the notice in a specified publication.

46. The employer applied for judicial review of, *inter alia*, the Board's directions with respect to the notice (*supra*). The Divisional Court held that the Board's directions in that respect were within the Board's jurisdiction under what is now section 89(4) of the Act as follows:

It was vigorously argued on behalf of Radio Shack that the notice was unreasonable in that it required the company to make an admission of wrongdoing. It was contended that in those instances where the Board required the company to confirm that it would cease and desist by inference indicated that the company had been guilty of prior misconduct, that is to say of breaches of the Act. It was submitted that such a compulsory admission of wrongdoing was most unreasonable.

A reading of the notice could give rise to some concern that the Board was perhaps being somewhat petty and overbearing in requiring a member of the company to read the notice. There

would seem to be no reason why the notice could not be read by a member of the staff of the Board.

Nonetheless, *the notice appears to be clearly within the jurisdiction of the Board*. Based upon the Board's finding in this case, the notice was essential to restore the union to the position that it occupied before it was weakened by the unfair acts of the company. As well, it is essential that the Board should not be unduly restricted in the steps it takes to ensure compliance with its orders.

[Application dismissed]

There does not appear to be anything in the notice which constitutes an admission of guilt by the company. At most, the notice constitutes confirmation of certain findings by the Board. Those findings were only made after due notice was given to Radio Shack; a hearing was conducted by the Board wherein opportunity must have been given to the company to put forward its position. Under the circumstances, compliance with the notice can hardly be considered an admission of guilt. The last submission of the company must, like the others be dismissed.

[emphasis added]

47. Similarly, in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, the Board found it appropriate to require the employer to sign and post a Board notice because:

23. In the *Radio Shack* case itself an array of remedies were utilized, many for the first time, in an attempt to redress the pervasive unlawful conduct present in that case. These remedies included damages for breach of the bargaining duty; posting of notices, mailing of notices; trade union access to company bulleting [sic] boards, to employee addresses, and to employees on company premises; cease and desist directions; and trade union "equal right of reply" rights at all labour relations meetings convened with bargaining unit employees by the company on its premises and time. New and important remedies were also developed and applied in *Westinghouse*, [1980] OLRB Rep. Apr. 577, in order to redress the complex impact of unlawful acts involving the relocation of a plant. But it is too easy to characterize these cases as exceptional and to forget about the remedial needs of the "run of the mill" unfair labour practice case, whether it involves an isolated dismissal, a change in working conditions, or some other act which comes nowhere close to the kind and range of conduct dealt with in the *Radio Shack* and *Westinghouse* cases. The Board must, however, resist this tendency [sic]. Recently, in *Hallowell House*, *supra*, the Board indicated that it would award interest in all cases involving a money order as an additional remedy. The Board has accepted that it should not develop remedies which are primarily aimed at punishment, but the *quid pro quo* for this restraint must be that all remedies are fully compensatory. *Hallowell House* dealt with the concept of full compensation in an economic sense.

24. However, the impact of unfair labour practices are seldom confined to an economic impact. For example, the isolated dismissal of an employee in the midst of or at the outset of an organizing campaign is likely to have a significant "chilling effect" on other employees who witness the incident and understand its origin. The dismissal of a fellow employee for union activity conveys a strong warning to other employees and can bring as top to an ongoing drive in its tracks. *The mere reinstatement of the employee directly affected, with backpay some time later, may do little to assure his or her fellow employees that the employer is prepared to live within the requirements of the statute and that effective remedies exist for those occasions where he will not.* (Indeed, if the experience in the United States indicating that only a small percentage of NLRB reinstated employees have the courage or will to return to work is applicable in Ontario, our reinstatement remedy may be ever less effective than this. See Stephens and Chaney, "A Study of the Reinstatement Remedy Under the National Labor Relations Act" (1974), 25 Lab. L.J. 31. However, one principal difference between the NLRB and the Board is the greater speed with which remedies may be mobilized and finalized under Ontario's *Labour Relations Act*. This factor may be an important difference to the effectiveness of our reinstatement orders.) We would add that our concern for remedial effectiveness is not limited to situations where employers are respondents. Trade unions have important obligations under the statute as well and individual employees who are mistreated by them must also be assured of future lawfulness. *One of the unique*

remedies developed by labour relations agencies to respond to the psychological impact of unfair labour practices requires the offender, whether employer or union, to communicate to employees affected by an unfair labour practice that it has been found guilty of violating statutory labour laws and that it will henceforth conform to their requirements. This remedy, in the usual form of a posting of a notice for sixty days in a conspicuous location(s) in the workplace, was first developed by the Board in *Radio Shack*, *supra*, although its origin in labour law is ancient. See for example: *The Falk Corporation* (1940), 308 U.S. 453, 5 LRRM 677 at p. 682; *Bradford Dyeing Association* (1940), 310 U.S. 318, 6 LRRM 703 at p. 715. In more exceptional cases the posting of a notice will be insufficient and mailing, publishing, and reading of notices may be directed in order to redress the impact of unfair labour practices in question. See *Radio Shack*, *supra*, at p. 1270. See also Comment, *Labor Remedies* (1968), 54 Virginia L. Rev. 38 at p. 48. And more generally, Comment, *NLRB Remedies - Moving Into The Jet Age* (1975), 27 Baylor L. Rev. 292. However, we believe the posting of notices should not be confined to exceptional cases because isolated violations of the Act have an undoubted and significant psychological impact on labour relations and the attainment of the statute's objectives. Making employees aware of the fact that an errant employer or trade union cannot violate the Act and that the employee has meaningful legal rights is vital to the success of *The Labour Relations Act*. Admittedly, the effect of the posting requirement often will be difficult to evaluate but this is no reason for inaction. Surely, for example, the fear for job security will be lessened with the realization that someone more authoritative than the employer has a voice in determining what he can do to those who support a trade union and that someone more powerful than a trade union will protect those who lawfully oppose it. Even a belated notice is better than none, if it helps to dispel any fears, confusion or ill-will created by a situation which has been equitably resolved.

48. In *National Bank of Canada v. Retail Clerks' International Union et al*, [1984] 1 SCR 269; 84 CLLC ¶14,037, the Supreme Court of Canada considered the propriety of two remedial orders made by the Canada Labour Relations Board:

- (a) a letter, drafted by the Canada Board, which the employer had been directed to have signed by its president and chief executive officer and sent to all employees; and
- (b) a trust fund which the Canada Board had directed the employer to establish to further the objective of the *Canada Labour Code*.

The Court was unanimous in its decision that both these orders should be set aside. The Court found that the trust fund remedy was not intended to remedy the breaches of the Code found by the Canada Board. Because the remedy had no direct connection to the breaches, it could not stand. The Court found that the letter remedy should also be set aside and because of the emphasis in it on the trust fund.

49. In additional reasons, Beetz J. concluded (with whom four of the other Justices concurred) that the letter remedy was also punitive in nature. He was concerned that the letter did not mention that it and the offending trust fund had been imposed by the Canada Board, and that it could therefor be interpreted as an expression of the views of the employer and its president. In the view of Beetz J., the trust fund and letter remedy both forced the employer and its president to do something which may be misleading or untrue, and was, as such, a totalitarian penalty alien to the free and democratic traditions of Canada and the guarantees in the *Canadian Charter of Rights and Freedom*.

50. In our view, the notices which the Board has for ten years ordered be posted in what the Board has considered to be appropriate cases are quite different from the letter remedy rejected in *National Bank of Canada*, *supra*. In the form posted, this board's notices are clearly identified as being notices of the board which the board has ordered the employer to post. They do not, in our view require an employer (or a person who signs a notice on behalf of an employer when that is part of the order) to express a view, either of the legislation, the Board's decision, or otherwise, which they may not hold. They do not contain things which are untrue or misleading.

Even those Board notices which contain an “assurance” that the employer will not breach the Act again do no more than require an employer, through an authorized representative, to put its signature to a pledge that it will abide by the laws of the Province. No right is unlimited and we do not view a direction that such an assurance be given as being inimical to the freedom guaranteed to persons in Ontario.

51. Nor has the Board’s use of posted notices become an automatic or “boiler plate” remedial response. Such postings are not directed in every successful application or complaint to the Board. In some cases the Board is not satisfied they are necessary. In others, the Board considers the impact such notices might have on a relationship which has improved after a difficult beginning (*Sonic Transport Systems Inc.*, [1981] OLRB Rep. Oct. 1483), or the complainant’s own conduct makes such a remedy inappropriate (see, for example, *International Paints (Canada) Ltd.*, [1983] OLRB Rep. Aug. 1316).

52. In this case, the respondent terminated the employment of half of the employees in the bargaining unit at the time the application was made. For the reasons given in *Valdi Inc.*, *supra*, the circumstances are such that a Board posting direction is both appropriate and necessary for labour relations purposes and as a remedy for the respondent’s breaches of the Act.

53. Therefore, with respect to the union’s complaint under section 89 of the Act, the Board:

- (a) declares that the respondent has violated section 64, 66, and 70 of the *Labour Relations Act*;
- (b) orders the respondent to forthwith reinstate all eleven grievors to their former positions;
- (c) orders the respondent to compensate the grievors for any wages and benefits they lost as a result of the respondent’s unlawful conduct together with interest thereon;
- (d) orders the respondent to forthwith and at its own expense, cause enlarge copies of the attached notice to employees (marked as an appendix hereto) to be posted in conspicuous places on its premises where they are likely to come to the attention of bargaining unit employees, including all places where all notices to such employees are posted, and to keep such notices posted for sixty consecutive working days;
- (e) orders the respondent to take reasonable steps to ensure that the aforesaid notices are not altered, defaced or covered by any other material and to provide reasonable physical access to the premises where the aforesaid notices are posted to representatives to the applicant/complainant (who need not be employees of the respondent) from time to time, so that they may satisfy themselves that this posting requirement has been complied with.

54. With respect to the application for certification, and having regard to the respondent’s agreement that any grievor who was found to have been improperly terminated should be treated as having been an employee in a bargaining unit for purposes of the application for certification herein (see paragraph 6, above), the Board is satisfied that more than fifty-five per cent of the

employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 24, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

55. A certificate shall therefore issue to the applicant.

56. The Board will remain seized with respect to any issue concerning the implementation of this decision, and particularly the order in paragraph 41(c), above, for a period of six months.

DECISION OF BOARD MEMBER ROBERT M. SLOAN; April 10, 1991

I. PREAMBLE

1. With respect, I dissent from the majority decision.

2. I am puzzled and perplexed by the majority decision which infers an anti-union motive when there is, in my view, a preponderance of credible evidence before the Board which refutes the allegations made by the applicant and supports the dismissal of the complaint.

3. The consequences of the majority decision are: to reject entirely the credible, compelling testimony and submissions of James Donnelly and Michael Donnelly as they relate to anti-union animus; to place an unwarranted and onerous financial burden upon the respondent which will exacerbate an already difficult financial picture; and to impose upon the respondent the punitive order of having to post a humiliating and degrading notice.

II. FINANCIAL POSITION

4. There can be no question that the respondent in exercising its powers at law to operate a business had every right to analyze its financial position and, if as a result of such analysis it became obvious that there was a substantial decline in revenues, then the respondent had the right also to consider and take the required steps to restructure their business to attempt to reduce the adverse impact of such revenue decline.

5. It is an absolute fact which is clear from the evidence submitted by the respondent - which evidence went unchallenged by the applicant, other than the irrelevant comment by the applicant's representative that the written material had not been audited - that substantial reverses in their business fortunes had been experienced in the year 1990.

6. The legitimate issues considered by Call-A-Cab management and details of which were placed before the Board in evidence included: the general economic recession; the cancellation of the Canada Post contract; the loss in school bus runs; the reduction in taxi call counts; and the downturn in the taxi business in Peterborough in particular and throughout North America in General.

7. The evidence clearly supports the respondents contention in its notice to its employees and owner operators dated October 11, 1990 that "...business volume is down 25%".

In paragraph 31 of the majority decision a question is raised with respect to "gross" and "net" amounts. If gross revenues are substantially reduced and fixed costs remain the same - this latter fact was established during the hearing - then it should come as no surprise to anyone that "net" revenues would be adversely affected.

Surely it is not for the Board to determine or define what level of economic reverses a company must experience before the Board will accept as legitimate the taking of remedial action.

III. METHOD OF RESTRUCTURING

8. Having established beyond any doubt that their business was experiencing a serious downturn, Call-A-Cab management turned its mind to what form of restructuring, if any, would be needed to offset the financial deficiencies. The method chosen was the cancellation of ten (10) owner operator agreements or contracts.

9. It was the respondent's submission, and this submission was unchallenged, that of the two categories of drivers viz., employees and owner operators, the company acquired more revenue from the operation of its employee-driven company-owned taxis than from those cabs owned and operated by independent owners. (The term "independent owners" appears in the form of agreement signed by a number of owner operators and the term "independent operators" was used a number of times during the hearing by the applicant's representative.)

10. It is clear then that at the time the restructuring was being considered the respondent had legitimate economic reasons for differentiating between the two groups of drivers and upon deciding that the downsizing of its fleet was a necessary step to be taken for business economic reasons, and further, deciding upon the retention of employees who operated company-owned vehicles rather than owner operators, there remained the choosing of which agreements to cancel.

It should be noted that in terms of flexibility, control, revenue generation, and operating efficiency, the respondent believed that its best economic interests would be served by retaining employees who drove company-owned cabs.

11. A further consideration in determining the selection of owner operators in the restructuring process was the knowledge which the Donnellys' had, (Michael Donnelly having obtained this information from Darlene Belair during their October 6, 1990 telephone conversation) that a petition had been circulated among owner operators in which the owner operators expressed opposition to a proposed computerized dispatch system, and according to the testimony of the applicant's witness Michael Del Grande the petition language included the owner operators' declared refusal to pay for any of the attendant costs of the proposed computerized dispatch system which the Donnellys' testified was essential to the upgrading and competitiveness of their taxi operations. This information, in addition to the other factors considered by the respondent, would certainly reinforce their decision to concentrate their profit improvement efforts through the reduction of independent owner operated taxis.

12. In summary then, the decision to cancel contracts with owner operators was made, according to the uncontradicted and unchallenged testimony of James and Michael Donnelly for strictly economic and operational reasons and was made at a time when neither of these two witnesses had any knowledge whatsoever of any union involvement by owner operators or for that matter by employee drivers.

IV. SELECTION OF OWNER OPERATORS

13. Michael Donnelly testified that having decided upon the release of owner operators the respondent was faced with the unpleasant task of how the selection should be made.

14. Michael Donnelly, following consultation with and at the request of James Donnelly, set about rating the various owner operators in terms of their performance - which included, as we

learned from testimony given - reliability, cooperation, dress, cleanliness (of vehicle and person), and attitude (to staff and customers).

15. As argued by counsel for Call-A-Cab the criteria and/or standard employed for the selection process was far removed from that which would be contemplated in a termination for just cause - there was absolutely no question here of any disciplinary considerations - in point of fact - for what it is worth - the evidence shows that no disciplinary measures of any kind had ever been imposed upon owner operators.

16. In *Sudbury Youth Service* [1990] OLRB Rep. Dec. 1339, at paragraph 25 the Board states:

“Where a union organizer is discharged during or soon following an organizing campaign it is natural to question whether the employee’s involvement in the union played a role in the decision to terminate. To that extent, where there is a connection in time between the events there may always be a doubt. However, the respondent is not required to satisfy the Board beyond any reasonable doubt but on a balance of probabilities and that doubt may well be satisfied by other evidence.”

In this present case the majority has chosen to resolve the “doubt” issue by inferring anti-union animus which effectively, and in my view, impugns the integrity and veracity of James and Michael Donnelly and Darlene Belair.

17. The selection process was carried out by the respondent - and the evidence here is uncontradicted and unequivocal - without any knowledge of any union activity or involvement on the part of any of the owner operators, and therefore without anti-union motive.

V. EVIDENCE SUPPORTING A DISMISSAL OF THE COMPLAINT

18. First, I would like to deal with the credibility of James Donnelly and Michael Donnelly in the giving of their testimony. In considering their testimony in relation to some of the factors against which such credibility is assessed by the Board - viz: the firmness of their memories; their ability to resist the influence of self-interest to modify their recollections; the consistency of their evidence; and their demeanour - the Donnellys’ were eminently credible witnesses.

19. In contrast, we must look to the testimony of the applicant’s two main witnesses Michael Del Grande and Peggy Immel. Michael Del Grande testified that he believed that call counts had not fallen off, but he had no evidence to support this view, and he also expressed the opinion that the computerized dispatch system would not work nor be beneficial to the Call-A-Cab operation, while admitting that he had no relevant experience or training in the area of computers, which would qualify him to form such an opinion.

Peggy Immel’s testimony is dealt with in the majority decision so there is no need to cover that ground again, other than to stress that with the discrediting of Ms. Immel’s testimony - a unanimous finding of the Board - the applicant was left without support for any of its allegations with regard to knowledge on the part of the respondent of any union activity by the owner operators prior to the taking of the decisions which resulted in the subject terminations.

20. In assessing the evidence in the light of the four factors which the Board found in *DeVilbiss (Canada) Limited*, File No. 0286-75-U, paragraph 12, to be determinative in finding an anti-union motive, I believe that the facts in this Call-A-Cab case clearly support an unequivocal finding that there was no anti-union motive for the termination of the services of the owner-operators.

It is abundantly clear to me that:

- (1) There was no *pattern* of anti-union activity - indeed there is no evidence of *any* anti-union activity;
- (2) The respondent had no knowledge of union activity before it made and announced the decision to terminate the services of the owner operators and consequently had no knowledge of any involvement by any of the owner operators in that activity;
- (3) The manner in which the owner operators were selected and informed of the decision was above reproach;
- (4) The respondent's witnesses were exceptionally credible.

VI. REMEDY AND ORDER TO POST NOTICE

21. With respect to the remedy imposed upon the respondent it is my considered opinion that what I would characterize as extremely severe penalties are entirely unjustified under the circumstances of this case.

22. Given that there was no direct or indirect evidence of anti-union motive on the part of the respondent the punitive effect of the remedy upon an employer already experiencing substantial financial difficulties is, in my view, extreme.

23. Further, the humiliating and demeaning nature of the order requiring the employer to post a notice "confessing" to a breach of the *Ontario Labour Relations Act* is punitive by any social standard that we may apply.

Such a measure is not required of persons or organizations in any other legal context, of which I am aware. The effect of this order can only be counter-productive to any attempt to establish a workable labour relations climate.

24. The written decision in all Labour Board cases is a public document available to any citizen who wishes to obtain it and read it, and from which individuals can acquire full knowledge of the decision and any dissent.

25. The fact that the Board's practice with respect to these notices has been in vogue at the Board since 1976 makes it no less intrusive. I believe that its use should be abolished - or if that is not in the cards, then its use should be restricted to only those instances where unanimous decisions of Board panels agree that circumstances warrant such a serious measure. Certainly this case does not fall into that category.

VII. FINALLY

26. As there is, in my view of the evidence, no basis in fact for the decision I would dismiss the complaint, and I would also dismiss the application for certification on the grounds of the lack of the statutorily-required membership evidence.

Appendix A
Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

AFTER A HEARING IN WHICH BOTH CALL-A-CAB LIMITED AND THE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION PARTICIPATED, THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT THE TERMINATIONS WHICH TOOK PLACE ON OCTOBER 9 AND 10, 1990 WERE IMPROPER. THE COMPANY HAS BEEN ORDERED TO REINSTATE THE 11 PERSONS WHO WERE TERMINATED AND TO COMPENSATE THEM FOR THEIR LOST WAGES AND BENEFITS. ALL OF THIS IS DESCRIBED IN THE BOARD'S DECISION.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES RIGHTS WHICH INCLUDE:

THE RIGHT TO ORGANIZE THEMSELVES;

THE RIGHT TO FORM, JOIN, PARTICIPATE IN AND BE REPRESENTED IN COLLECTIVE BARGAINING BY THE TRADE UNION OF THEIR CHOICE;

THE RIGHT TO REFUSE TO DO ANY OF THESE THINGS.

THE COMPANY IS PROHIBITED BY THE ACT FROM:

DOING ANYTHING WHICH INTERFERES WITH THESE RIGHTS OF EMPLOYEES UNDER THE LABOUR RELATIONS ACT.

DOING ANYTHING TO PENALIZE EMPLOYEES BECAUSE THEY HAVE SELECTED THE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION AS THEIR BARGAINING AGENT, OR DO ANYTHING TO INTERFERE IN THAT TRADE UNION'S RIGHTS TO REPRESENT THE EMPLOYEES IN THEIR EMPLOYMENT RELATIONS WITH CALL-A-CAB LIMITED.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 10TH

day of APRIL

. 19 91 .

1221-90-G Teamsters Local Union No. 91, Applicant v. Farry Excavating & Grading Ltd., Respondent

Construction Industry - Construction Industry Grievance - Whether dump truck drivers hauling excavated material away from construction site falling within Teamsters' provincial agreement covering "on-site Teamsters" - Board finding phrase "on-site Teamsters" having same meaning as phrase "teamsters engaged in on-site construction" used in designation of employee bargaining agency - Board holding that drivers in question, when hauling material excavated on site to both on-site and off-site dump sites, falling within scope of Teamsters provincial agreement

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *M. Vukobrat* and *J. Kurchak*.

DECISION OF OWEN V. GRAY, VICE-CHAIR AND BOARD MEMBER J. KURCHAK; April 24, 1991

1. Farry Excavating & Grading Ltd. ("Farry") is an excavation contractor. In the summer of 1990, it performed excavation at and moved excavated material on and from a construction site in Ottawa described in these proceedings as "the Green Creek project." It did that pursuant to a contract with a general contractor, who was building a sewage treatment plant on the site.

2. The applicant ("Local 91") claims that Farry's employment of the dump truck drivers to move excavated material on and from the Green Creek site was covered by the provincial agreement ("the Teamsters provincial agreement") between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the Teamsters Construction Council of Ontario (collectively, "the Teamsters employee bargaining agency") and the Construction Site Teamster Employer Bargaining Agency. As the affiliated bargaining agent of the Teamsters employee bargaining agency with jurisdiction in the Ottawa area, Local 91 grieves that the respondent ("Farry") breached that agreement by failing to apply its provisions to that employment. That grievance has been referred to this Board for arbitration under section 124 of the *Labour Relations Act* ("the Act").

3. By its terms, the Teamsters provincial agreement applies to the employment of "all on-site Teamsters for whom the Union has bargaining rights in the ICI Sector of the Construction Industry in the Province of Ontario", with certain exceptions which are not in issue here. Farry concedes that it is bound by this agreement, but denies that it applies to its employment of dump truck drivers in connection with the Green Creek project. In particular, it denies that those truck drivers were "on-site Teamsters" or that they were employed in the construction industry or, if employed in the construction industry, that they were employed in the industrial, commercial and institutional ("ICI") sector of the construction industry.

4. One of the points in issue between the parties is whether the construction of a sewage treatment plant is construction in the ICI sector of the construction industry. When this referral came on for hearing they agreed to defer determination of that issue (and issues relating to whether there has been a breach and what remedy any such breach should attract) and asked that the Board first decide the following question:

Assuming without conceding that the construction project in question falls within the ICI sector of the construction industry, is hauling excavated material on and from the project covered by the terms of the Teamsters provincial agreement?

This seemed a sensible way to proceed. Having since heard and considered their evidence and argument on that question, we now set out our answer to it.

5. When Farry is engaged as an excavation contractor, some of its employees (the “operators”) use excavating equipment to dig the hole or holes into which other contractors will later place some structure. The operators put the excavated material into dump trucks driven by other Farry employees (the “drivers”). The drivers may move that material to another part of the site. More often, however, they move the excavated material away from the site to some place where it can be dumped. Such dump sites can be at some distance from construction sites. As a result, the drivers spend a great deal of their time on public streets and highways travelling between construction sites and dump sites.

6. This is the sort of work Farry was doing when, in August 1988, Teamsters Local Union No. 230 applied under the construction industry provisions of the Act for certification with respect to a unit of Farry’s drivers. As amended in September 1988, that application covered the usual Teamsters construction industry unit, which the Board described this way when it granted the application:

all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham employed as Teamsters engaged in on-site construction, save and except non-working foremen and persons above the rank of non-working foreman.

(The Board also expressly excluded “persons covered by the subsisting collective agreement between the respondent and the International Union of Operating Engineers, Local 793.”) In so far as it concerned the ICI sector, this certification conferred bargaining rights on all of the affiliated bargaining agents of the Teamster employee bargaining agency, including Local 91.

7. Farry Longo is the owner and President of Farry Excavating & Grading Ltd. He testified that after the drivers were organized, when he complained he could not afford to pay the rates set out in the Teamsters provincial agreement, officials of Local 230 said he should agree to be bound by the terms of that Local’s comprehensive, all sector agreement with Rumble Contracting Limited and other members of the Associated Earthmovers of Ontario (“the Rumble agreement”). They told him that he would not have to pay the rates in the ICI agreement if he did that, that consistent with that Local’s treatment of the other signatories to the Rumble agreement, it would only require him to pay his drivers the lower rates in the Rumble agreement, regardless of the sector in which the drivers were being employed. The Rumble agreement covers “all drivers in the employ of the Employers in the Labour Relations Board Area Number eight (8) and Board Area Number nine (9).” Farry agreed to be bound by that agreement. Thereafter, and without complaint by Local 230, Farry paid its drivers the rates set out in the Rumble agreement for all work, including hauling excavated material on and from ICI construction sites.

8. The Green Creek contract was Farry’s first venture in the Ottawa area, which is beyond the geographic scope of the Rumble agreement. The general contractor had invited Farry to bid on that job because, it said, prices in Ottawa from local contractors were “inflated.” It was originally anticipated that none of the material to be excavated on the Green Creek site could be used as backfill, so that all of it would have to be removed from the site. As the work proceeded, however, 10 to 15 percent of the excavated material was found to be suitable for backfill and was retained on site. Farry trucks moved it from the excavation to another part of the site about 400 metres away.

The other excavated material was taken to one of three sites: a regional landfill site about 75 minutes' drive (one way) from the construction site, an abandoned gravel pit 40 minutes' drive from the site and a residential subdivision 20 to 25 minutes' drive from the site. It did not take more than a few minutes to load a dump truck on site. Consequently, drivers assigned to take loads to one of these off-site locations spent most of each working day off-site.

9. Counsel for the employer called Andrew Pilat to testify with respect to "practice" and the negotiation history of the Teamsters provincial agreement. Mr. Pilat has been General Manager of the Sarnia Construction Association since 1982 and Chairman of the Construction Site Teamster Employer Bargaining Agency since 1984. Counsel for Local 91 objected to the introduction of that evidence. We received it on the basis that we would determine later what weight it should be given, if any.

10. Mr. Pilat testified that he believes that the Teamsters provincial agreement applies to teamsters only while they are doing exclusively on-site work, like hauling excavated material from one point to another on site or acting as on-site warehousepersons, and not to drivers hauling excavated material from a construction site to off-site locations. He judged that there were very few occasions when drivers were covered by the agreement, because very few employers have remitted the industry fund levy which the provincial agreement requires them to pay the Employer Bargaining Agency when they have employees covered by the agreement.

11. Mr. Pilat testified that all members of the Sarnia Construction Association were bound by the Teamsters provincial agreement. He was aware of 10 to 12 other employers in the province who were also bound, but did not claim to have an exhaustive list. He said his experience in the Sarnia area was that when hauling of excavated material away from ICI sites was required, it was generally subcontracted to owner operators or small contractors who were party to collective agreements with the local Teamsters union, and that the drivers doing that work were dealt with in accordance with the terms of local collective agreements covering other sectors and not those of the ICI agreement. He could only think of one bound employer who might have contracted to do work in the Ottawa area of the sort in question here, and thought that employer would have subcontracted that work. He mentioned at least two projects on which he thought a bound employer who had not remitted any industry fund levy must have employed teamsters covered by the provincial agreement. He did not suggest he had made any effort to investigate whether bound employers had been obliged to but failed to pay industry fund levy.

12. Mr. Pilat said that he had been involved in the negotiation of the Teamsters provincial agreement in one capacity or another since the 1980 negotiations. He testified about a proposal of the union in those 1980 negotiations that the language of subcontracting clause be changed. He thought that proposal would have enlarged the scope of the agreement. He did not suggest that the proposal expressly addressed or raised a question about the status of employees hauling excavated material to off-site locations, nor that in or while making it the union had conceded that such employees were not covered by the existing agreement. He also testified that in the 1982 and 1988 negotiations, the union sought a provision requiring that suppliers of materials be in contractual relations with the union. The language of the 1988 proposal was this:

all delivery of materials such as steel, aggregates, ready-mix concrete, etc., to or from those construction sites covered by this agreement as listed in Article 1 Section 1.1 will be done by company's [sic] who have a contractual relationship with the teamsters union.

Again, Mr. Pilat did not suggest that the status of drivers hauling excavated material to off-site locations was specifically discussed during those negotiations.

13. The status of drivers hauling excavated material to off-site locations became an issue in the 1990 negotiations as a result of a grievance filed against another contractor (Van Bots) prior to those negotiations. One of the matters put in dispute in that grievance was whether drivers hauling excavated material to off-site locations fell within the scope of the Teamsters provincial agreement. As a result, when negotiations began the union proposed that the scope clause be amended to substitute “on and off site” for “on site” in the scope clause. The union also proposed language expressly stating that the agreement applied to drivers hauling excavated material on and off-site without regard to whether the drivers spent a majority of their time on the site. On the evidence, neither of these union proposals amounted to or was accompanied by a concession that the agreement would not otherwise apply to drivers of the sort in question here. Indeed, the last mentioned proposal was expressly made without prejudice to the union’s position that such drivers were already covered by the language of the agreement.

14. The union called Albert Marinelli to testify in reply to the evidence of Mr. Pilat. He has served as the International Union’s Director of Construction for Canada since 1977. He has been a participant in the bargaining of the Teamster’s provincial agreement since the inception of provincial bargaining in 1978. Indeed, he testified that he was involved in applying for the Ministerial designation of the Teamster employee bargaining agency. Counsel for the respondent objected to his being asked any questions about that application; in the face of that objection, (and without our having ruled on it) counsel for the union chose not to ask questions in that area.

15. It was Mr. Marinelli’s evidence that the union felt that drivers hauling excavated material from ICI projects to off-site locations were within the scope of the Teamster’s ICI agreement and that the union had never conceded otherwise in collective bargaining. He acknowledged that the union was content to have excavation contractors employ drivers in accordance with the terms of a local agreement covering other sectors when, as he understands it, the labourers’ and operating engineers’ unions do the same thing by way of schedules to their provincial agreements. He said that to his knowledge, the union and its locals had not sought to enforce the ICI agreement against any employer who was employing its members to do ICI work and was applying the terms of a local agreement covering other sectors.

16. On the evidence of both Mr. Pilat and Mr. Marinelli, the first time the applicability of the Teamsters provincial agreement to hauling of excavated material to off-site locations was formally discussed at the provincial bargaining table was during the 1990 negotiations. A number of proposals were exchanged which would have accommodated application of the terms of local agreements covering work of this sort in other sectors to such work when performed in the ICI sector. No agreement was reached.

17. Counsel for Farry argues that the question here is whether the phrase “on-site Teamsters” applies to drivers hauling off site. She says that “on-site” is unambiguous and cannot apply to those drivers. If “on-site” is ambiguous, she says, then past practice and the behaviour of the Teamster employee bargaining agency in collective bargaining show that the provincial agreement has not been understood or treated as applying to hauling excavated material off site.

18. Counsel for the union argues that the scope of the collective agreement is determined by the Minister’s designations under section 139 of the Act and the definition of “construction industry” in clause 1(1)(f) of the Act. He submits that “on-site Teamsters” in the collective agreement means the same as “teamsters engaged on on-site construction” in the designation of the employee bargaining agency. He argues that the adjective “on-site” imports the same qualification as the phrase “at the site thereof” in the statutory definition of “construction industry.” That does not require that an employee be at the site continuously in order to be employed “in the construc-

tion industry” or “on on-site construction.” Because of the requirements of the province-wide bargaining provisions of the Act and particularly section 146, he argues, the beliefs and behaviours of those affected by the agreement cannot alter its scope, nor can they assist in interpreting those provisions of the agreement which define its scope. He argues that the drivers engaged in hauling excavated material from an ICI construction site are employed in the ICI sector of the construction industry all the time they are engaged in that task, not just while they are physically on the construction site.

19. The literal interpretation of “on-site Teamsters” suggested by the respondent has a certain superficial attractiveness. Its attraction fades considerably, however, when one considers the context to which the applicant refers. In that context, the literal interpretation requires a finding that in 1978 either the Minister of Labour determined that the Teamsters Union and its locals could not henceforth represent in collective bargaining drivers of the sort in question here, or the participants in provincial bargaining deliberately excluded from coverage drivers about whose employment they were obliged to bargain.

20. Clause 1(1)(f) of the Act provides that

“construction industry” means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;

The Board first considered the language of what is now clause 1(1)(f) in *Cedarhurst Paving Co. Limited*, [1964] OLRB Rep. Dec. 442 (sometimes cited as “Cedarhurst Paving Co. Limited”). That was an application by Teamsters Local Union No. 230 for certification under the construction industry provisions of the Act for an “all drivers” unit. The respondent to that application argued that the unit should be limited to dump truck drivers engaged on construction sites. Unlike the case before us, the respondent there conceded that dump truck drivers would not have to be continuously engaged on a construction site in order to fall within the bargaining unit.

21. The Board found the concession appropriate. It noted that the “at the site” language in the definition of “construction industry” focuses on the activity of the business rather than that of the individual employee engaged in that business. It also observed that

... it seems reasonable to conclude that before an employer can be said to be operating a business in construction of “works” at the site thereof, he must have employees at work on the site. But it also seems reasonable to conclude that in the operation of the business at the site, employees may from time to time have to leave the site to perform work in connection with the work at the site. Further, the operation of the business at the site may well include the use of employees in transporting materials and equipment to the site, even though these employees are not, in one sense, directly involved in “on site” work.

The parties had also agreed, and the Board found, that drivers engaged in transporting materials or equipment to third parties would not be covered by a construction industry application. That is consistent with subsequent decisions of the Board: *Ethier Sand & Gravel Ltd.*, [1979] OLRB Rep. Oct. 962; *Canadian Road Asphalts Ltd.*, [1980] OLRB Rep. Mar. 299; *Maitland Redi-Mix Concrete Products Limited*, [1980] OLRB Rep. Dec. 1751.

22. In *Cedarhurst*, the parties disagreed about whether drivers of float trucks, service trucks and gas trucks were employed in the construction industry within the meaning of the Act. The Board found that they were. In coming to that conclusion, it applied this test:

If the operations or services performed by these drivers are regarded as an integral and necessary part of the business of the respondent in constructing, altering or repairing roads at the site,

then in our view the wording of the definition of construction industry in section 1(1)(da) [now 1(1)(f)] is wide enough to include such employees under the construction industry provisions of the Act.

23. The *Cedarhust* decision formed the basis on which the Board thereafter distinguished between drivers who fall within a construction industry bargaining unit and those who do not: see *K.J. Beamish Construction Co. Limited*, [1964] OLRB Rep. Dec. 398; *Drope Paving Construction Limited*, [1966] OLRB Rep. June 190; *Bergman & Nelson Limited*, [1966] OLRB Rep. June 190; *McDougall-Walbridge-Aldinger (Ontario) Limited*, [1966] OLRB Rep. Nov. 594; *Keystone Contractors Limited*, [1967] OLRB Rep. June 233; and, *Matthews Group Limited*, [1969] OLRB Rep. Mar. 1299. Before 1978, when the Legislature imposed provincial bargaining in the ICI sector, certification decisions ordinarily made no reference to “sector” and teamster bargaining units in construction industry certification applications were typically described in terms of “all truck drivers in the employ of the respondent” in a particular Board area: see *Boston Excavating & Grading Company Limited*, Board File No. 1648-75-R, unreported decision dated February 18, 1976, and *Active Excavating & Contracting Limited*, Board File No. 0825-76-R, unreported decision dated August 12, 1976.

24. There can be no doubt that in performing the excavating contract at the Green Creek site, the respondent was operating a business in the construction industry. Removal of excavated material from the construction site was an integral and necessary part of that business. In our view, the drivers who drove that material to places where it could be dumped were employed in the construction industry both while they were on the construction site and while they were off site travelling between the construction site and a dump site.

25. We are supported in that conclusion by clause 117(b) of the Act, which was added to the Act in 1970, and provides that

“employee” includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees.

This provision reinforces and, perhaps, extends the approach the Board took in *Cedarhust*. It makes it clear that it is the employer’s business which must be engaged in construction of works “at the site thereof” and that while an employee must have a connection with that on-site work or with the employees doing it, the connection is not necessarily broken when the employee is away from the site. We also note that in *Canadian Road Asphalts Limited*, *supra*, the Board concluded that a driver’s employment to haul excavated material away from a construction site in a dump truck would be employment in the construction industry even where, as appears to have been the situation in that case, the driver’s employer was not involved in any other construction activity at that site.

26. The term “sector” is defined in clause 117(e) of the Act:

“sector” means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and water mains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector;

In *Steen Contractors Limited*, [1989] OLRB Rep. Nov. 1173, the Board observed that the characteristics of excavation work are a function of the purpose of the excavation. Adapting the like observation in the *Steen* decision at paragraph 12 to the circumstances of this case, we think it would be anomalous to conclude that excavation for the construction of a sewage treatment plant and the actual construction of such a plant fall within different sectors of the construction industry.

It would also be anomalous if the hauling of excavated material fell within the ICI sector while the truck was on the site but slipped into some other, unidentified sector when a truck left the site in order to dump a load of excavated material. If the construction of the sewage treatment plant at the Green Creek site falls within the ICI sector, as we are to assume for the purpose of this decision, then the excavation work and the associated hauling of excavated material both on and off site also fall within the ICI sector.

27. In short, we are persuaded that on the tests applicable before 1978 (and on the assumption that the Green Creek project was a construction project in the ICI sector of the construction industry), the drivers in question here were employed in the ICI sector of the construction industry while hauling excavated material to off site locations.

28. Amendments to the Act in 1978 (with significant modifications in 1980) introduced province-wide bargaining in the ICI sector of the construction industry, pursuant to what are now sections 137 to 151. The central theme of those provisions is that for all but a few independent unions in the construction field, there is to be one set of negotiations every two years with respect to all workers for whom a particular craft union or any of its affiliated locals has bargaining rights. This bargaining takes place between an employee bargaining agency representing the craft union and its affiliated locals, and an employer bargaining agency representing all employers for whose employees any of those unions hold bargaining rights. These two bargaining agents are not selected by the parties to be bound; they are designated by the Minister of Labour under subsection 139(1) of the Act. The Minister's designation determines the statutory bargaining authority of those bargaining agents. The result of their bargaining is a "provincial agreement" (clause 137(1)(e) of the Act).

29. The many unions and employers parties who became subject the province-wide bargaining scheme had a variety of bargaining practices before that scheme was imposed. The statutory scheme required a substantial departure from many of those practices, particularly for parties whose bargaining was entirely local or who bargained collective agreements without regard to the sector in which the work was performed. As a review of the Board's decisions in this area since 1978 would quickly reveal, the precise effect of the statutory provisions chosen to implement province-wide bargaining was not always apparent to all those affected by it. The meaning and effect of those provisions has been explored and elaborated by the Board on an on-going basis ever since they were introduced, in the course of litigation brought before it in circumstances like these, where parties have been unable to negotiate their own answer to a question which must then be adjudicated with reference to the relevant statutory provisions as well as those of the parties' agreements.

30. It is central to the scheme of provincial bargaining established by the Act that there be only one collective agreement with respect to the employees described in the designation of an employee bargaining agency: the provincial agreement that employee bargaining agency makes with the corresponding employer bargaining agency. Subsection 146(2) of the Act prohibits employers and trade unions, among others, from making any other collective agreement or arrangement affecting those employees:

146.(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents

other than a provincial agreement as contemplated by subsection (1), and any collective agreement that does not comply with subsection (1) is null and void.

The language of subsection 146(2) is clear and very restrictive. The Board has repeatedly interpreted it to mean precisely what it says and refused to give effect to local agreements which purport to supersede, modify or exclude the application of the provincial agreement: see *Rockwell Concrete Forming (London) Limited*, [1988] OLRB Rep. Sept. 963, particularly at paragraphs 17-20, as well as *The Board of Education for the City of Windsor*, [1988] OLRB Rep. Mar. 342, *Inscan Contractors (Ontario) Inc.*, [1986] OLRB Rep. May 640, and *Roy Construction and Supply Company Limited*, [1982] OLRB Rep. Sept. 1332.

31. One of the significant consequences of the scheme of province-wide bargaining established by the Act is described in this passage from *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254:

44. The designation orders issued pursuant to section 139(1) of the Act describe the provincial units of employees contemplated by the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of trades and designate, for each such bargaining unit, an employer and employee bargaining agency. In effect, such orders designate the trade(s) which "belongs" to each employee bargaining agency and its affiliated bargaining agents. *Employee bargaining agencies, and their affiliated bargaining agents, can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent (see Ninco Construction Ltd., [[1982] OLRB Rep. Nov. 1692 July 1104]; Manacon Construction, [1983] OLRB Rep. Mar. 407, Superior Plumbing and Heating Ltd., [1986] OLRB Rep. OLRB Rep. Nov. 1589; D. E. Wütrner Plumbing and Heating Limited, [1987] OLRB Rep. Oct. 1228).*

[emphasis added]

An affiliated bargaining agent cannot represent a worker employed in the ICI sector of the construction industry unless that worker falls within the scope of its designation under subsection 139(1) of the Act (or of an express exclusion authorized by subsection 139(2)).

32. On April 24, 1978, the then Minister of Labour designated the Teamster employee bargaining agency to represent

all teamsters engaged on on-site construction represented by the following affiliated bargaining agents:

1. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; or
2. The Teamsters Construction Council of Ontario; or
3. The following local Unions: 91, 141, 230, 879, 880, 990; or
4. Any other local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which, in the future, may be chartered to represent all teamsters engaged on on-site construction.

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;

- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to [sic] which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

We note that the part of the designation which follows the words “without limiting the generality of the foregoing” does not employ the adjective “on-site.”

33. On April 24, 1978, the then Minister of Labour also designated the Construction Site Employer Bargaining Agency to represent

all employers whose employees are represented by the following affiliated bargaining agents:

- 1. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; or
- 2. The Teamsters Construction Council of Ontario; or
- 3. The following local Unions: 91, 141, 230, 879, 880, 990; or
- 4. Any other local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which, in the future, may be chartered to represent teamsters engaged on on-site construction.

(which Council and Unions are hereinafter collectively referred to as “the Unions”), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to [sic] which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

We note that this designation does not use the adjective “on-site.”

34. Counsel for the respondent employer submits that the designation of the Teamster employee bargaining agency does not cover teamsters hauling excavated material to off site locations. She argues that the Minister might have left such drivers out of the designation in order to preserve or leave room for the kind of arrangements referred to in evidence, whereby the terms of local agreements are applied on an all sector basis to hauling of excavated material off site. The difficulty with this argument is that it was not within the Minister’s power to preserve local bargaining by affiliated bargaining agents with respect to work which falls within the ICI sector of the construction industry. As we have already noted, an affiliated bargaining agent which is the subject of a designation cannot acquire bargaining rights with respect to any person employed in the ICI sector who does not fall within the scope of that designation: *Manacon Construction*, [1983] OLRB Rep. Mar. 407.

35. The definition of “construction industry” in clause 1(1)(f) of the Act was not changed when province-wide bargaining was introduced. The test for whether a worker is employed in the construction industry remains the same as it was before 1978. The Board’s analysis in *Cedarhurst Paving Co. Limited*, *supra*, remains relevant, persuasive and applicable in resolving that question

with respect to truck drivers. Nothing in the province-wide bargaining provisions themselves makes the drivers in question here any less employed in the ICI sector of the construction industry than they would have been had those provisions not been introduced. If the Minister's 1978 designations did not encompass some drivers employed in the ICI sector of the construction industry, then the Minister thereby precluded the various manifestations of the Teamster's Union from representing those drivers, drivers whom they had been able to represent before the province-wide bargaining scheme was introduced. It seems most unlikely that the then Minister intended her language to have that effect; there is certainly no evidence that she had that intention or that there was any reason for her to have formed that intention.

36. In our view, the adjective "on-site" in the phrase "teamsters engaged on on-site construction" in the designation modifies the word "construction", not the word "Teamster." "Engaged" means the same as "employed", and a teamster may be employed on on-site construction while away from the site in the same way that he or she may be employed in the construction industry in those circumstances. In other words, "engaged on on-site construction" means "employed in the construction industry" in the sense the Board elaborated in *Cedarhurst*, when it took into account the effect of the words "at the site thereof" in the definition of "construction industry." The need for the "on-site" connection thus identified in *Cedarhurst* may have been expressly noted in the designation simply to make it clear that teamsters whose employer's only connection with a construction site is as supplier of materials to others would not be covered by the provincial agreement.

37. The foregoing analysis establishes this: the drivers in question were "teamsters engaged in on-site construction" within the meaning of the Ministerial designation which conferred statutory bargaining authority on the Teamster employee bargaining agency. In our view, the question before us -- whether those drivers fall within the scope of the Teamsters provincial agreement -- must be assessed against that background.

38. Counsel for the applicant argues that, having regard to the context in which it is used, the phrase "on-site Teamsters" in the Teamsters provincial agreement means the same thing as the phrase "teamsters engaged in on-site construction" in the Minister's designation of the Teamster employee bargaining agency. Counsel for the respondent argues that the adjective "on-site" should be applied literally, so as to exclude a driver while he or she is physically off the site. She also argues, however, that because the drivers in question spent such a large portion of their working time off site they should not be regarded as having been "on-site Teamsters" even during the periods when they actually were on site. Having regard to this latter argument, it may be said that both sides agree that the adjective "on-site" should not always be applied literally.

39. It is suggested that the evidence demonstrates an understanding between employers and the union since 1978 that hauling excavated material to off-site locations was not part of the work referred to in the Teamsters provincial agreement. This proposition is supported by the further suggestion that the evidence indicated that the number of employees "employed under" the Teamsters provincial agreement have been very few in number.

40. The fact that few employers have remitted the industry fund levy to the employer bargaining agency can be given no weight in assessing whether the Teamsters provincial agreement applies to drivers hauling excavated material away from ICI construction sites. There is more than one possible reason for it. At best, it is evidence of a hearsay nature that some unidentified employers believe they are not obliged to make that remittance. That may reflect nothing more than acceptance of the belief of Mr. Pilat who, if asked, would have told an employer of drivers hauling excavated material to off site locations that those drivers would not be covered and that it

therefore did not have to pay the levy with respect to its employment of them. In any event, someone's belief about the meaning or application of the agreement is irrelevant unless offered in support of its truth, and for that purpose it should be given no weight when there is no way to ascertain and permit cross-examination on the basis of the belief.

41. The evidence does establish that, in practice, a Teamster local might well forebear enforcing the ICI agreement against an employer doing ICI construction work in its geographic jurisdiction if the employer acknowledges the local's representational rights with respect to drivers employed in the ICI sector and honours the terms of another agreement with the local in the employment of those drivers in the ICI sector. This would explain why the issue raised here might not have been litigated earlier. No-one could identify any previous situation, other than the one which gave rise to the Van Bots grievance, in which it was alleged that an employer bound by the Teamsters provincial agreement had caused or permitted work of the sort in question here to be performed by drivers not employed on terms satisfactory to the Teamsters local with geographic jurisdiction where the work was performed. Here, that local was the applicant, Local 91, with whom the respondent had no agreement other than the provincial agreement.

42. Whatever other effect they might have had, though, these local arrangements between employers and local unions cannot have brought the employment of drivers employed in the ICI sector within the scope of a local agreement covering other sectors. No agreement except a provincial agreement may address the employment of workers employed in the ICI sector of the construction industry for whom an affiliated bargaining agent holds bargaining rights. Only the designated employer and employee bargaining agencies can make a provincial agreement. Only the agreement of those agencies could have determined whether drivers of the sort in question here were included in or excluded from coverage by the provincial agreement.

43. Furthermore, no agreement, understanding or arrangement between the employer and employee bargaining agencies or between employers and unions affected by their collective bargaining could alter the meanings of the statutory terms "construction industry" and "commercial, industrial and institutional sector." No such agreement could alter the scope of the designations made under section 139 or the statutory bargaining authority and responsibility which those designations imposed on the employer and employee bargaining agencies. Although the employer and employee bargaining agencies could have agreed that while working in the ICI sector some drivers would receive the wages, benefits and working conditions specified in local agreements covering other sectors, they could not cause those drivers to fall within the scope clauses of those other agreements. Even if the employer and employee bargaining agencies had agreed that some drivers employed in the ICI sector of the construction industry would not be covered by the provincial agreement, drivers of that sort for whom the Teamsters union or one of its locals had bargaining rights still could not have been "covered" in any enforceable way by any other agreement.

44. The employer and employee bargaining agencies came to the bargaining table authorized and obliged to bargain with respect to terms and conditions of employment of all "teamsters engaged on on-site construction" for whom the Teamster employee bargaining agency or its affiliates had bargaining rights in the ICI sector of the construction industry. They made an agreement in which the employer bargaining agency recognized the employee bargaining agency (referred to as "the Union") as "the exclusive Bargaining Agent for all on-site Teamsters for whom the Union has bargaining rights in the ICI sector of the Construction Industry in the Province of Ontario," with certain exceptions. Counsel for the respondent asks us to conclude that when they adopted those words the parties excluded from the agreement some "teamsters engaged on on-site construction" for whom the Union had bargaining rights. Counsel for the respondent did not suggest that the parties *intended* to exclude from the agreement some teamsters whose employment fell

within the scope of their bargaining authority. We were not offered any reason why they might have shared such an intention. There was no evidence that they did. Indeed, Mr. Marinelli's evidence supports the opposite conclusion.

45. Given the statutory framework within which their negotiations take place, we should not be quick to conclude that the direct participants in provincial bargaining have failed to exercise their statutory authority with respect to some employees who fall within the scope of their designations. In all the circumstances, and in the absence of any evidence that any difference between "on-site Teamsters" and "teamsters engaged on on-site construction" was ever discussed at the bargaining table, it is not unreasonable to suppose that the parties intended the language they adopted to be co-extensive with the language of the designations. This is an entirely reasonable supposition even if, as it appears, the parties held different views as to the scope of those designations. The resolution of that difference in the applicant's favour in this case does not amount to conferring on it bargaining rights it did not previously have.

46. We find that the phrase "on-site Teamsters" in the collective agreement does not mean anything different from the phrase "teamsters engaged on on-site construction" used in the designation of the Teamsters employee bargaining agency. Having found that the drivers in question here were "teamsters engaged on on-site construction" when employed to haul material excavated on-site to both on-site and off-site dump sites, we find that drivers of the respondent when hauling excavated material on and from the Green Creek project fell within the scope of, and were therefore covered by the terms of, the Teamsters provincial agreement.

47. The parties are to advise the Registrar whether they require any further hearings in this matter. If no request to relist this matter for hearing is made within one year of the date hereof, this proceeding will be considered terminated.

DECISION OF BOARD MEMBER M. VUKOBRAT; April 24, 1991

1. I draw the following conclusions from the evidence presented to the Board on the above case.

- 1) The Board was asked to assume without conceding that the Construction Project known as the Green Creek Project in Ottawa falls within the I.C.I. sector of the construction industry.
- 2) The hauling of excavated material on-site is work covered by the Construction Site Teamsters Provincial Agreement.
- 3) The hauling of excavated material off-site is not work covered by the Construction Site Teamsters Provincial Agreement. The language of the Construction Site Teamsters Provincial Agreement is very specific insofar as it mentions only on-site and does not mention hauling excavated material off-site.
- 4) The Designation in 1978 by the Minister of Labour specifically states "engaged on on-site". It makes no mention of off-site.
- 5) In my opinion there has been a clear understanding between employers and the union since 1978 that indicates hauling off-site was not part of the work referred to in the Construction Site Teamsters Pro-

vincial Agreement. Other agreements have been used to cover off-site hauling throughout the Province.

- 6) The testimony of both parties indicated that the number of employees employed under the Construction Site Teamsters Provincial Agreement are and have been very few in number. I conclude, therefore, it has obviously been understood by both parties that off-site hauling is not covered by the Construction Site Teamsters Provincial Agreement but by other Agreements in the industry.
- 7) It is my opinion that the union has been attempting to expand its bargaining rights with respect to the Construction Site Teamsters Provincial Agreement and having failed to do so has asked the O.L.R.B. to do its work for them.
- 8) In conclusion only that portion of hauling on-site on this project (approximately 10-15%) is covered by the terms of the Construction Site Teamsters Provincial Agreement.

REASONS FOR CONCLUSIONS IN MY DECISION:

- 1) With respect to the excavated work performed, i.e. digging a hole into which other contractors will later place some structure, it should be noted and understood that additional excavations by others would be required in order to excavate trenches, etc. for footings. This was indicated by the contractor's evidence.

The contractor (Farry Excavating and Grading Ltd., Mr. Farry Longo) testified that the tender documents called for all excavated material to be hauled off-site and it was only after excavations commenced that the general contractor determined that some of the excavated material was suitable for use as back fill at a later date. This resulted in approximately 10 to 15% of the excavated material to be hauled on-site and stored for future use as back fill for structures, etc.

- 2) Mr. Pilat's testimony indicates that the Teamsters Provincial agreement is predominately used in Sarnia and seldom used in other areas of the Province, except for physically large construction sites having many acres of area, such as large mega projects constructed by companies like Bechtel and Lumus. Hauling on-site on these projects entails the use of excavated materials often for the purposes of constructing other facilities such as brine ponds and dikes as is the case with chemical plants.

Mr. Pilat was quite specific when he stated his belief and understanding that the Teamster's Provincial agreement does not apply to drivers hauling excavated material from a construction site to off-site locations. He again further stated that there were very few occasions when drivers were covered by the agreement. Mr. Pilat further testified that when material was hauled off-site from these types of

projects, that it was always done under-over the road agreements or road agreements.

My understanding of over the road agreements is that they are trucking agreements and the road agreements refer to agreements utilized by contractors working on property surrounding I.C.I. buildings, but under terms and conditions of non I.C.I. collective agreements such as;

- Road and Parking lot agreements
 - Sewer and Watermain agreements
 - Utilities agreements
 - Heavy Engineering agreements
- 3) The absence of discussion during 1980, negotiations as to whether drivers were covered by the agreement when hauling material off-site indicates to me that there always was an agreement that hauling off-site was not covered by the Teamster's Provincial Agreement.
 - 4) The union made proposals in 1982 and 1988 requesting that an expansion to their jurisdiction of the Teamsters Provincial agreement should include the delivery of materials to and from construction sites covered by the agreement. The absence of any suggestion by Mr. Pilat that the status of drivers hauling excavated material to off-site locations was specifically discussed does not concede that those drivers were covered by the Teamster's Provincial agreement. To the contrary, in my opinion, it supports the argument that there was always a clear agreement that drivers hauling off-site were not covered by the Teamster's Provincial Agreement.
 - 5) It is my further opinion that the view that there was an agreement between the parties is further confirmed by the fact that industry fund remittances received from the administrator of the union/management funds, indicated minimal employment requirements under the Teamsters Provincial agreement.
 - 6) In my opinion "off-site" became a problem issue for 1990 negotiations as a result of a grievance filed against another contractor, Van Bots Construction, who as I understand it, is a general contractor who is not a signatory to any teamster agreement. It is my further understanding that, that is one of the primary issues in that case - i.e. that the contractor was not a signatory to a union agreement. That case appears to be much more complex than the issue of on-site, off-site.

Since the Van Bots case was in question just prior to the 1990 round of bargaining, it was only then that the union formally requested a change to the scope of the Teamsters Provincial agreement, to add the words off-site. Although in my opinion there was a clear agreement of the scope and application of the Teamsters Provincial agreement between the parties, the union saw fit to advise the employer bargaining agency that they now had to make "off-site" a bargaining

issue. In my view they took this action so that it would assist them (the union) in resolving a much greater problem resulting from the issues of the Van Bot's case.

- 7) Based on my understanding of the construction industry, a teamster hauling a load of gravel in a dump truck to a construction site and working under the terms of an over the road trucking agreement, does not become a construction worker when he arrives inside the confines of that construction site. He may, as is often the case, after the discharge of his load of gravel, pick up a load of excavated material to haul to another site. Is he then a construction worker? I would submit that of course *he is not*.
- 8) It is very often a construction employer's practice to perform work outside the construction industry as is the case when using his equipment such as dump trucks to haul materials under the over the road trucking agreements and to perform functions such as snow removal.

I would submit that the union had a clear understanding of this requirement and has always understood that this type of work, i.e. hauling off-site is and should be done under other than the Teamsters Provincial agreement, i.e. over the road hauling or other agreements.

Furthermore, based on my knowledge of the industry, many employers in the construction industry will make a call to a trucking company having dump trucks or to any company having dump trucks and operating under the over the road agreements or other agreements, to come and pick up a few or many loads of excavated material and to haul it off-site. In my opinion when this occurs there has been a clear agreement by the union and by the employer that this was *not construction*.

What makes this case any different in that regard? Here we have a sub-contractor who is working for a general contractor and agrees to excavate a hole using employees working under the Operating Engineers agreement. He then brings employees, who he has always paid under the terms of a union agreement, other than the Teamsters Provincial agreement, to the site with the employer's dump trucks to pick-up the excavated material and to haul it off-site.

- 9) With respect to Mr. Marinelli's evidence for the union, he acknowledged that the union was content to have excavation contractors employ drivers in accordance with the terms of local agreements covering other sectors. This evidence in my opinion does reflect the clear agreement between employers and the union since 1978 that this work is not covered by the Teamsters Provincial agreement.

It is my opinion that it was only in 1990, when the union faced a potential problem with a contractor that was not employing union members (Van Bots), that they chose to attempt to expand their

bargaining rights provincially. Having failed to do so, they have come to this Board so that this Board would do it for them.

1057-90-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 800, Applicant v. Gorf Contracting Limited, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Construction Industry - Union proposing bargaining unit including plumbers and steamfitters in non-ICI sectors in Board Area 20 - Employer arguing, on community of interests grounds, that "appropriate geographic area" should include Board Area 19 as well - Community of interest concept having limited application in construction industry - Board finding bargaining unit applied for appropriate - Union challenging 18 individuals on list of employees filed by employer on ground that they were not journeymen or apprentices - Board ruling only journeymen or apprentices in the trade, within the meaning of *Apprenticeship Act*, eligible to be counted as employees in bargaining unit - Board rejecting employer argument that 4 individuals employed as apprentice plumbers should not be included on list of employees because they were apprenticed to local apprenticeship committee and not employer - Certificates issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *B. L. Armstrong*.

APPEARANCES: *M. Zangari* and *A. Ahee* for the applicant; *Jay Josefo* for the respondent; *Enrique Beboso* for the objectors.

DECISION OF THE BOARD; April 12, 1991

1. By oral decision given at the hearing on April 3, 1991, the Board directed that certificates issue in the manner and for the reasons which follow.
2. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139 of the Act on May 14, 1982, that designated employee bargaining agency is the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.
3. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is made pursuant to section 144(1) of the Act.
4. The applicant sought to be certified as the exclusive bargaining agent for a bargaining unit it described as follows:

all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the Respondent engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman

and

all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the Respondent in Board Geographic Area No. 20, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman.

This is very much a "standard" bargaining unit description for the applicant.

5. The respondent agreed with the applicant's bargaining unit description as far as it went but submitted that the "appropriate geographic area" for non-industrial, commercial and institutional sectors of the construction industry should include Board area 19 as well as well as Board area 20. The respondent submitted that both Board areas should be included because of the community of interest between the affected employees in them and to prevent fragmentation of the respondent's workforce.

6. There is no doubt that a bargaining unit including, plumbers, steamfitters and their apprentices employed by the respondent in the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario and such persons employed by the respondent in non-ICI construction in Board Areas 19 and 20 would constitute a bargaining unit of employees appropriate for collective bargaining. In other words, Board Area 19 plus Board Area 20 would be an "appropriate geographic area" within the meaning of section 144(1). That does not, however, mean that Board Area 20 does not by itself constitute such an appropriate geographic area. As the Board observed in *Dagmar Construction Limited*, [1987] OLRB Rep. Apr. 480, the Board, has, since *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729, interpreted section 144 as permitting but not requiring a trade union to apply to be certified for employees in more than one geographic Board area. At paragraph 12 of *Dagmar Construction Limited*, *supra*, the Board held that:

12. Section 144(1) of the Act requires only that an application for certification relating to the ICI sector of the construction industry be for a bargaining unit consisting of all employees who could be bound by a provincial agreement together with all other unrepresented employees in at least one appropriate geographic area. In our view, the language of section 144(1) contemplates that an employer in the construction industry may have unrepresented construction employees in other than the ICI sector of the construction industry in more than one geographic area. The words "in at least one appropriate geographic area" *permit* a trade union to make its application with respect to more than one geographic area. They do not, in our view, require the trade union to do so. Furthermore, in determining the unit of employees that is appropriate for collective bargaining, and ascertaining the number of employees in that bargaining unit at the time the application was made and the level of support in the unit for the trade union's application for certification, the Board has developed practices and procedures that recognize that the make up of any given employer's employee complement rarely remains constant. Even in non-construction businesses employees may be continually coming and going as a result of hiring, firing, lay-offs, leaves of absence, and so on. The nature of the construction industry is such that employment with a particular employer tends to be even more ephemeral. In the face of this labour relations reality, the Board must, under section 7(1) of the Act, ascertain the number of employees in the bargaining unit and the number of such employees who are members of the applicant trade union at particular times. In addition, section 119(2) of the Act specifies that, in applications for certification under the construction industry provisions of the Act, the Board need not have regard to any increase in the number of employees in a bargaining unit after the application was made. The rule adopted by the Board in the construction industry is that persons who are not both employed by and at work for the respondent employer on the date the application is made are not included as employees in the bargaining unit for purposes of "the count" even though their absence on the date of application was due to uncontrollable circumstances (see for example, *Smiths Construction Company Arnprior Limited*, [1984] OLRB Rep. Mar 521; *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41). The requirements of the Act and the ephemeral nature of employment in the construction industry are such that it is neither

possible nor practical for the Board to speculate about what persons may at some unspecified time in the future be affected by a successful application for certification. Accordingly, the applicant in this case is not required to make its application in relation to Board Area 8.

[emphasis added]

Further, as the Board pointed out in *Superior Plumbing & Heating Company Ltd.*, [1986] OLRB Rep. Nov. 1589, the “community of interest” concept has limited application in the construction industry, which is fragmented by its very nature and subject to the overriding principles and structure of the construction industry provisions of the Act. The applicability of the community of interest concept and the Board’s general discretion to determine whether a bargaining unit is appropriate in the construction industry are limited by sections 6(3), 119, the designations issued under section 139, and section 144 of the Act (see, for example, *Wraymar Construction and Rental Sales Ltd.*, [1989] OLRB Rep. June 682; *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254 and [1989] OLRB Mar. 234; *Beaver Brook Estates Inc.*, [1989] OLRB Rep. Apr. 322; *Beling Cement Construction Limited*, [1989] OLRB Rep. July 709).

7. The issue before the Board in applications like this one is not which bargaining unit is the most appropriate, but rather whether the bargaining unit applied for is an appropriate one.

8. In this application, the respondent was unable to point either to any changes in the construction industry or to any special circumstances in its case which merited a different approach by the Board either generally or specifically in this case. Accordingly, the Board found, pursuant to section 144(1) of the Act, that all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Town of Kirkland Lake and the geographic Townships adjacent thereto in the District of Temiskaming (i.e. Board Area 20), save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. With respect to the list of employees in the bargaining unit, the parties agreed that R. Bleau, J. Middleton, L. Landers and F. Knox were employees in the bargaining unit on the date of application herein. They also agreed that J. Sornberger and J. Traykowicz were not at work on the date of application and should therefore not be included on the list of employees. As a result of the Board’s ruling with respect to the bargaining unit description as aforesaid, B. Butterworth, M. Caron, J. Nabuab, R. Raymond, and L. Scott (who were at work for the respondent in other than the ICI sector in Board area No. 19 on the date of application) were not employees in the bargaining unit. Eighteen other individuals had been included by the respondent on the list of employees it filed. The applicant challenged their inclusion on the basis that they were not journeymen or apprentice plumbers or steamfitters within the meaning of the *Apprenticeship and Tradesmen’s Qualifications Act* (the “*Apprenticeship Act*”), which the respondent conceded they were not.

10. The respondent did not dispute that the Board could apply the *Apprenticeship Act*, but it submitted that the Board should not do so. Counsel submitted that the Board should determine the issue on the basis of the work that the individuals in question were actually doing at the material times, and not on the basis of whether they held the status of a journeyman or apprentice in the trade. In essence, counsel submitted that if a person was performing either plumbing or steam-fitting work s/he should be included in the bargaining unit for purposes of an application for certification.

11. The Board dealt with this very issue in *O. J. Pipelines Incorporated*, [1989] OLRB Rep. Sept. 976 as follows:

7. The designation orders issued pursuant to section 139(1) of the Act describe the provincial units of employees for the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of trades, and designate, for each such provincial bargaining unit, an employer and an employee bargaining agency. In effect, such designation orders designate the trades which “belong” to each employee bargaining agency and its affiliated bargaining agents for purposes of the province-wide collective bargaining scheme. In the result, employee bargaining agencies and their affiliated bargaining agents can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent (*Ninco Construction Ltd.*, *supra*; *Manacon Construction Limited*, *supra*; *Superior Plumbing & Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228; *Ellis-Don Limited*, *supra*; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Indeed, the structure of the Act requires an affiliated bargaining agent to seek bargaining rights for all employees in the trade(s) which its employee bargaining agency has been designated to represent in bargaining in the ICI sector (in the pertinent designation order) when making an application for certification which relates to that sector (*Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924; *Kraft Construction Company (1978) Ltd.*, [1989] OLRB Rep. Feb. 169; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Consequently, in applications for certification under section 144(1), the Board, although not necessarily bound to use the precise words of the designation order, cannot describe a bargaining which relates to the ICI sector in a manner which is inconsistent with the applicable designation order. To accommodate the designation system, and recognizing that trade union representation in the construction industry has historically been along trade lines, the Board’s practice, in applications under section 144(1), is to describe bargaining units in terms of the relevant trade and to use the words of the applicable designation order.

8. Pursuant to the designation order referred to in paragraph 1 above, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of the Plumbing and Pipefitting Industry of the United States and Canada, has been designated to represent in bargaining in the ICI sector of the construction industry” all Journeymen and Apprentice Plumbers and Pipefitters” represented by its affiliated bargaining agents.

9. Sections 1(a) and (b), 9 and 11 of the *Apprenticeship and Tradesmen’s Qualification Act*, R.S.O. 1980, Chapter 24, provide that:

1. In this Act,

- (a) “apprentice” means a person who is at least sixteen years of age and who has entered into a contract under which he is to receive, from or through his employer, training and instruction in a trade;
- (b) “certified trade” means a trade designated as a certified trade under section 11;

• • •

9.-(1) Every person who commences to work at a trade for which an apprentice training program is established but who does not hold a certificate of apprenticeship or qualification in that trade shall,

- (a) forthwith apply in the prescribed form for apprenticeship in that trade; and
- (b) within three months after commencing to work in that trade, file with the Director his contract of apprenticeship.

(2) Every person who fails to comply with subsection (1) shall, upon the expiration of

the period of three months mentioned in clause (1)(b), cease to work in that trade until he files with the Director his contract of apprenticeship or until the Director authorizes in writing the continuation or resumption of such work.

11.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), shall work or be employed in a certified trade unless he holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade.

(4) When a trade is certified under subsection (1), a person who is working in the trade at the time that it is certified shall be allowed a period of two years from the first day of the month following the month in which the trade is certified to qualify for a certificate of qualification in the trade, if he,

- (a) is the holder of a certificate of apprenticeship in the trade; or
- (b) satisfies the Director that he has been continuously engaged as a journeyman in the trade for a period of time in excess of the apprenticeship period for the trade; or
- (c) satisfies the Director that he is qualified to work in the trade and meets such other requirements as the Director may prescribe.

10. It is evident from the Board's decisions in cases like *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594; *C T Windows Limited*, [1982] OLRB Rep. Nov. 1597 and [1983] OLRB Rep. May 627; *Mechanical Insulations Roofing & Siding Ltd.*, [1985] OLRB Rep. April 549; *Naylor Group Incorporated*, [1986] OLRB Rep. Nov. 1563; *Phase IV (4) Electrical Contractors Limited*, Board File No. 2792-87-R, unreported decisions dated March 25, 1988 and July 5, 1988), and *B. C. Meck*, [1988] OLRB Rep. June 546 that the focus of the Board's concern in applications for certification relating to bargaining units described in terms of compulsory certified trades is that persons working or employed in such trades be lawfully so engaged before they are considered to be employees for certification purposes. Consequently, the Board has applied the *Apprenticeship and Tradesmen's Qualification Act* in such cases in determining the list of employees in such bargaining units for certification purposes.

11. Pursuant to Regulations 52 and 59 (R.R.O. 1980) respectively under the *Apprenticeship and Tradesmen's Qualification Act*, the trades of "plumber" and "steamfitter" are compulsory certified trades. The Board has determined that the labels "pipefitter" and "steamfitter" are synonymous for purposes of the *Labour Relations Act* (*D. E. Witmar Plumbing and Heating Limited*, *supra*, at paragraph 9). Consequently, a person must be either a journeyman or apprentice in the plumbing or steamfitting trades within the meaning of the *Apprenticeship and Tradesmen's Qualification Act* to be able to lawfully work or be employed as a plumber or steamfitter respectively in the Province of Ontario.

12. In *P & M Electric (1982) Ltd.*, [1989] OLRB Rep. June 638, the Board observed that:

9. The *Apprenticeship and Tradesmen's Qualification Act* is a statute of general application in the Province of Ontario. Its purpose is to regulate the training and qualifying of tradesmen and, in the case of a compulsory certified trade, to regulate the persons who can work at various trades so designated. Although it is not for this Board to enforce statutes like the *Apprenticeship and Tradesmen's Qualification Act*, the Board is, in our view, obligated to not make decisions or proceed in ways which are inconsistent with laws of general application which are specifically directed at matters with

which it must be concerned in the course of exercising its powers in performing the duties conferred or imposed upon it by or under the *Labour Relations Act*.

10. In our view, it would be inconsistent with the *Apprenticeship and Tradesmen's Qualification Act* for the Board to find that persons who are neither qualified journeyman nor apprentices, within the meaning of that legislation, to be in a bargaining unit which relates to a compulsory certified trade for the purpose of certification proceedings before the Board. Further, the issue of community of interest in trade or craft bargaining units is determined primarily on the basis of the skills and working conditions which are characteristic of employees engaged in that craft or trade. In the construction industry, the community of interest question has largely been resolved by the development and operation of businesses and trade unions in that industry along trade or craft lines. Both the structure of the *Labour Relations Act* and the Board's approach to the construction industry recognize that (see *Ellis Don Limited*, [1988] OLRB Rep. Dec. 1254, particularly at paragraphs 37-46). In our view, it would make no labour relations sense to include in a construction industry bargaining unit which relates to a compulsory certified trade, for the purpose of certification proceedings under the *Labour Relations Act*, persons who cannot lawfully work in the bargaining unit before or after certification and who share no real community of interest with electricians who are entitled to work in that trade pursuant to the *Apprenticeship and Tradesmen's Qualification Act*.

(See also *McLeod et al. v. Egan et al.*, (1974) 46 D.L.R. 3rd 150) S.C.C.); *Re Ontario Hydro and Ontario Hydro Employees Union, Local 1000 et al.* (1983) 41 O.R. 2nd 669 (Ont. C.A.)). We agree and find that reasoning equally apposite to this case which deals with the compulsory certified trades of plumbing and steamfitting.

13. Having regard to section 144(1) of the *Labour Relations Act*, the provisions of the *Apprenticeship and Tradesmen's Qualification Act* and Regulations thereunder, and the designation order referred to in paragraphs 1 and 8 above, the Board is satisfied that a person must be a journeyman or apprentice plumber or steamfitter, within the meaning of the *Apprenticeship and Tradesmen's Qualification Act* in order to be counted as an employee in a bargaining unit described in terms of such tradesmen in an application for certification which relates to the ICI sector of the construction industry.

14. This brings us to the question of whether welders said to be working in the plumbing or steamfitting trades can be considered to be employees in such a bargaining unit. We note that while welding is subject to the provisions of the *Boilers and Pressure Vessels Act*, R.S.O. 1980 Chapter 46, it has not been recognized as a separate trade either under the *Apprenticeship and Tradesmen's Qualification Act* or by the Board. Nor is either welding or welders the subject of any of the designation orders which have been issued to date. Indeed, a number of construction industry trade unions, including the applicant, claim some type of welding as part of their trade jurisdiction.

15. In the result, we find ourselves constrained to conclude that the only persons who perform welding functions who should be included as employees in a bargaining unit of plumbers and steamfitters are those who are either journeymen or apprentices in one or other of those trades.

16. Counsel for the applicant referred us to the Board's decision in *Rainscreen Metals Systems Incorporated*, [1989] OLRB Rep. May 482 in which the Board found it appropriate to stipulate in a clarity note that sheeters, sheeters' assistants and material handlers were employees in a bargaining unit of journeymen and apprentice sheetmetal workers. The trade of sheetmetal worker is a compulsory certified trade under the *Apprenticeship and Tradesmen's Qualification Act*. However, there is no indication that the appropriateness of that clarity note was put in issue in that proceeding. Nor is it obvious that the employees working as sheeters, sheeters' assistants and material handlers to which that clarity note refers were other than apprentice or journeymen sheetmetal workers. Finally, the "Sheet Metal Workers" designation entitles the employee bargaining agency named therein to represent journeymen and apprentice sheetmetal workers and sheeters, sheeters' assistants and material handlers. (There is no reference to welders in the designation order which governs this application). Consequently, the *Rainscreen* decision is readily distinguishable from this case.

17. Counsel for the applicant also complained about the unfairness that would result from a decision which precludes the applicant and its employee bargaining agency from becoming the exclusive bargaining agents of welders who are engaged in the plumbing or steamfitting trade but who are neither journeymen nor apprentice plumbers or steamfitters. He set out the example of construction industry employers who employ primarily or exclusively such welders. Indeed, it appears that it is not uncommon for both unionized and non-unionized employers to employ welders who are neither journeymen nor apprentice plumbers or steamfitters to perform work generally considered to be in the plumbing or steamfitting trade.

18. The Board is not unaware or unsympathetic to the dilemma faced by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada in this respect, particularly since a significant number of its members are (so we understand) welders who are or [sic] neither journeymen nor apprentice plumbers or steamfitters. The Board also accepts that, to the extent that it is possible, the Board's practices and policies should reflect and be responsive to the real world of labour relations rather than *vice versa*. However, the applicant cannot have it both ways. Either the *Apprenticeship and Tradesmen's Qualification Act* applies or it does not. The applicant has consistently argued in cases before the Board that it does apply, and the Board, as the *Irvcon Roofing & Sheetmetal (Pembroke) Ltd.* line of cases illustrates, has accepted that argument. As the Board pointed out in *P & M Electric (1982) Ltd.*, *supra*, it is not for this Board to enforce the *Apprenticeship and Tradesmen's Qualification Act* as such.

19. The Board is an administrative tribunal established by the *Labour Relations Act* to administer and apply that legislation. As such it is empowered and obligated "to determine all questions of fact or law that arise in any matter before it" (section 106(1)). However, as a creature of statute, the Board has no powers other than those conferred upon it by or under the *Labour Relations Act* (or other legislation which delegates powers to it; see, for example, section 24 of the *Occupational Health and Safety Act*, R.S.O. 1980 Chapter 321). Consequently, although it is obliged to apply laws of general application the Board has only those powers which have been conferred upon it by statute. The Board has no separate or additional inherent or equitable jurisdiction to "do what it thinks is best". In the Board's view, the solution to any difficulties which may be occasioned by the conclusions it has found itself constrained to arrive at in this case are to be found, if at all, in another forum.

20. We understand that the Ontario Pipe Trades Council has requested that the Minister amend the present designation order so that the employee bargaining agency referred to in paragraph 1 above would be entitled to represent in bargaining in the ICI sector "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices and all qualified welders working in the plumbing and steamfitting trades". Although that may be a solution, we observe that adopting that approach would seem to create a conflict between the designation order and the *Apprenticeship and Tradesmen's Qualification Act*. On the other hand, this kind of apparent conflict has existed for some years between the sheetmetal workers designation and the *Apprenticeship and Tradesmen's Qualification Act* (see *E. S. Fox Limited*, to be reported in [1982] OLRB Rep. July).

21. In the result, the Board is satisfied that it is unnecessary to include the clarity note requested by the applicant herein insofar as it relates to welders who are either journeymen or apprentice plumbers or steamfitters. The Board is also satisfied that the clarity note is not appropriate insofar as it relates to other persons employed as welders working in the plumbing or steamfitting trades since those persons are not properly included as employees in the bargaining unit applied for herein for certification purposes.

(See also *E. X. Fox Limited*, [1989] OLRB Rep. July 738.) We agreed with this approach and found it both generally appropriate and applicable to this case. The respondent was unable to suggest any cogent reason to find otherwise.

12. The Board therefore ruled that only plumbers or steamfitters who were journeymen or apprentices in the trade, within the meaning of the *Apprenticeship Act*, on the date of application herein were eligible to be counted as employees in the bargaining unit herein. The eighteen indi-

viduals included on its list of employees by the respondent as aforesaid and were neither such journeymen nor apprentices were therefore not employees in the bargaining unit for purposes of this application.

13. Finally with respect to the list of employees, the applicant asserted that T. Rae, R. Whitman, R. Zaba and A. Bois should be counted as employees in the bargaining unit. The respondent conceded these four individuals were employed by it in the plumbing and steamfitting trade in Board area 20 on the date of application, and that they were apprentices within the meaning of the *Apprenticeship Act* at the time. However, the respondent submitted that they should not be included on the list of employees because they were apprenticed to the "Sudbury Plumbers & Steamfitters L.A.C".

14. It was not suggested that the "Sudbury Plumbers & Steamfitters L.A.C." is not a local apprenticeship committee within the meaning of the *Apprenticeship Act*. Sections 1(d) and 4 of the *Apprenticeship Act* provide that:

1. In this Act,

...

- (d) "employer" includes the Crown and any other public authority, the Ontario Apprenticeship Institute and any local apprenticeship committee;

...

4. The Director may appoint local apprenticeship committees composed of such persons as he considers appropriate for any area of Ontario to advise and assist him in matters relating to apprenticeship or tradesmen's qualifications in the area.

Further, section 7 of Regulation 52 to the *Apprenticeship Act* (for "plumbers") provides that:

7. The number of apprentices who may be employed by an employer in the certified trade shall not exceed,

- (a) where the employer is a journeyman in the trade, one apprentice plus an additional apprentice for every three journeymen employed by the employer in the trade and with whom the apprentice is working; and
- (b) where the employer is not a journeyman in the trade, one apprentice for the first journeyman employed by the employer plus an additional apprentice for each additional three journeymen employed by the employer in the trade and with whom the apprentice is working.

(See also Regulation 59 for "steamfitters" under the *Apprenticeship Act*).

15. There is nothing in either the *Apprenticeship Act* or the Regulations thereunder which requires an apprentice to be apprenticed to the employer for which s/he works either for ratio purposes or otherwise. On the contrary, the *Apprenticeship Act* contemplates that a local advisory committee, which does not employ tradesmen as such, is nevertheless an "employer" for purposes of the *Apprenticeship Act*. It may appear somewhat anomalous that an employer may not necessarily know when one of its employees becomes a true apprentice. On the other hand, if a person is engaged in a compulsory certified trade (like plumbing or steamfitting) he must be either a journeyman or such an apprentice. Further, the transitory nature of much of the employment in the construction industry is well suited to apprenticing individuals to local advisory committees in that it does not require a change in the apprenticeship contract every time the apprentice changes employment. In any event, the Board's concern in a construction industry application for certifica-

tion is whether an individual was employed in the bargaining unit on the date of application; that is, in this case whether s/he was a journeyman or apprentice plumber or steamfitter employed by the respondent and at work for it on the date of application.

16. In the result, we ruled that Rae, Whitman, Zaba and Bois should be included on the list of employees.

17. We wish to note that in his submissions with respect to all of the above issues, counsel for the respondent argued that the Board was not bound by its own precedents and that because every case must be decided on its own merits, the Board should be prepared to revisit the issue in every case. It is of course true that the Board is not “bound” by its own precedents and that each case stands to be determined on its own merits. However, the Board’s practices and policies, as reflected in its jurisprudence, do provide guidelines and a background against which cases are decided. No case is decided in a vacuum and it would be inappropriate to attempt to re-invent the labour relations wheel at every turn. On the other hand, there is much to be said for consistency. The Board’s practices and policies try to reflect and be responsive to the real world of labour relations and exist for the guidance of the labour relations community, not for the Board. And while no policy or practice is, or should be, written in stone, it would be inappropriate to change or depart from them without there being cogent reasons for doing so. In this case, the respondent offered no such cogent reasons.

18. In the result, the Board was satisfied that there were eight employees in the bargaining unit herein at the time the application was made. The Board was also satisfied, on the basis of all the evidence before it, that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 3, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

19. Also filed with the Board was a statement of desire in opposition to the application. Although it contained some seventy-four signatures, only two of these are of employees in the bargaining unit on the date of application who had previously signed one of the pieces of membership evidence submitted by the applicant in support of this application. Because it is only these “overlapping” signatures which would be relevant to the Board’s considerations (see, for example, *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138), the statement of desire would not, even if voluntary, have raised a sufficient doubt with respect to the continued support for the application among the respondent’s bargaining unit employees to cause the Board to exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken notwithstanding the applicant’s level of support as manifested by the membership evidence it filed.

20. Consequently, the applicant was entitled to be certified. Accordingly, and having regard to the provisions of section 144(2) of the Act, the Board directed (orally) that a certificate, to be dated April 3, 1991, issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employees bargaining agency named in paragraph 2 above, in respect of all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

21. Further, and also pursuant to section 144(2) of the Act, the Board directed (also orally) that a certificate, also to be dated April 3, 1991, issue to the applicant with respect to all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent

in the Town of Kirkland Lake and the geographic Townships adjacent thereto in the District of Temiskaming, excluding the industrial, commercial and institutional sector, and save and except non-working foremen and persons above the rank of non-working foreman.

0004-90-OH G. Ryerson, Complainant v. H. H. Robertson Inc., Respondent

Discharge - Health and Safety - Employee claiming that he was discharged for expressing safety concerns and refusing to work in unsafe environment - Board finding that discharge not "safety related" and, therefore, not in violation of s.24(1) of *Occupational Health and Safety Act* - Board holding, however, that s.24(7) of the *Act* gives the Board discretion to review disciplinary penalty - Employee not acting in good faith - Complaint dismissed and discretion to modify penalty not exercised in this case

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *G. O. Shamanski* and *R. R. Montague*.

APPEARANCES: *Norm Carriere, Glen Ryerson* and *Terry P. Dawson* for the complainant; *Robert J. Atkinson* and *Reg Jordan* for the respondent.

DECISION OF R. O. MacDOWELL, ALTERNATE CHAIR, AND BOARD MEMBER G. O. SHAMANSKI; April 15, 1991

I

1. This is the complaint of Glen Ryerson ("the complainant"), who contends that he has been discharged contrary to section 24 of the *Occupational Health and Safety Act* (OHSA). Mr. Ryerson claims that he was discharged because he expressed safety concerns and refused to work in an environment which he reasonably believed to be unsafe.

2. The respondent company replies that Mr. Ryerson's termination had nothing to do with his alleged safety concerns. The company asserts that the complainant was discharged because he failed to produce satisfactory medical evidence to explain a period of absence from work. The company relies upon Article 6.07 of the collective agreement which reads, in part:

Seniority shall be considered broken when:

...

(d) an employee is absent for a period of seven calendar days or more without reasonable cause.

In the company's submission, the complainant failed to establish "reasonable cause" for his absence, Article 6.07 is triggered automatically and he loses both his seniority and his right to continued employment.

3. The hearing in this matter consumed several days during which we received a considerable amount of oral and documentary evidence. In assessing the credibility of the oral evidence, we have taken into account such factors as: the demeanour of the witnesses when giving their evidence, the clarity and consistency of that evidence when tested by cross-examination, the witness-

es' ability to recall events and resist the tug of self interest in shaping their answers, and what seems most probable in all the circumstances. The documents however, present a problem. Many of them contain statements by various doctors concerning the complainant's health, ability to work, or possible return to work, but none of those doctors gave evidence. Accordingly, we are not in a position to assess the basis for these medical opinions. Nevertheless, we admitted this material because it was part of the narrative, was considered by the company both before and at the time of the grievor's termination, and was arguably relevant to the exercise of our discretion under section 24(7) of the Act.

4. The relevant portions of Section 24 read as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

• • •

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

Section 24(7) of the OHSA may be usefully compared with section 44(9) of the *Ontario Labour Relations Act* to which we will refer later:

44.(9) Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbi-

trator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances.

It will be seen that sections 24(7) and 44(9) are virtually identical, with the result that an arbitrator and the Ontario Labour Relations Board have the same remedial authority; moreover both adjudicators may have to interpret the collective agreement to see if it contains a “specific penalty”.

5. To round out the statutory picture, we might also set out section 89(4) of the *Ontario Labour Relations Act* which is incorporated by reference into the OHSA:

89.-(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of [the OHSA] and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to [the OHSA] it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

Where a breach of the OHSA is established, the Ontario Labour Relations Board has broad powers to fashion an appropriate remedy, regardless of the terms of any collective agreement.

6. It will be convenient to deal with the events preceding this complaint in approximate chronological order.

II

7. The company is a manufacturer of sheet metal building materials with production facilities in Hamilton, Ontario. It has several buildings on a thirteen acre site. The complainant is a millwright whose duties would ordinarily take him to all parts of that work site.

8. One of the company's products is “formawall” which consists of two metal sheets with a layer of polyurethane foam between them. Formawall is made by pouring polyurethane liquid between the metal sheets, then waiting a minute or so for the liquid to harden or “cure”. While the polyurethane is in liquid form it contains isocyanates. Isocyanates are dangerous substances. A worker exposed to isocyanates may become “sensitized” so that any further exposure can pose a serious health hazard.

9. Formawall is made in an area of the plant known as the “tunnel”. Under the

Occupational Health and Safety Act and Regulations, the tunnel is a “designated exposure area” for isocyanates. It is the only such area on the work site.

10. In February 1987 there was a chemical spill involving isocyanates. The complainant was one of two employees on the scene, and therefore *potentially* sensitized to isocyanates. We say “potentially”, because it was not immediately clear whether the complainant had in fact been sensitized.

11. As a result of the spill, the company and the union agreed to participate in an isocyanate surveillance program administered by the McMaster University Occupational Health Clinic. The complainant was examined by doctors associated with that program on June 11, 1987. The medical report following this examination states that “The medical examination and laboratory tests were based on health history, exposure data, and physical findings”. The complainant was pronounced fit to work *without restrictions*, and, in particular, without any restrictions concerning exposure to isocyanates. There was no lost work time and for several months the complainant continued to work in all parts of the worksite, including the tunnel area.

12. For a part of 1987 and much of 1988, the complainant was off work as a result of a knee injury. Towards the end of 1988 he indicated his intention to return to work and requested a further examination by the McMaster Occupational Health Clinic. The complainant explained that it had been 18 months since his last consultation with McMaster, and he wanted the physicians to reconsider his case before he went back to work. During his long absence, of course, there was no new exposure to isocyanates (or at least none of which the complainant was aware).

13. We do not know what additional testing was done in December 1988, if any, or what the complainant may have told the doctors in 1988-89 that he failed to tell them in 1987. We do know that the McMaster Clinic expressed a different opinion than it had in 1987. By letters dated December 23, 1988 and January 6, 1989, Doctor D.C.F. Muir, the Director of the Clinic, advised the company that the complainant was able to return to work but now only *with restrictions*, namely “not to work with isocyanates; specifically, areas of tunnel and paint shop...plant chemist can determine where isocyanates exist”. Incidental, or potential exposure could be dealt with by the use of an approved and properly fitted respirator.

14. From the company’s perspective it did not matter whether the complainant was actually sensitized to isocyanates or whether Dr. Muir’s opinion was tendered out of an abundance of caution. It now had a millwright who could not work in certain areas of the plant. Accordingly, on January 11, 1989 the company advised the complainant as follows:

We are in possession of a letter from Dr. Muir, Director of The Occupational Health Programme of McMaster University restricting you from working in both the foam tunnel area and the paint shop due to health problems. This unfortunate news is disturbing to the company. We are very concerned about your well-being and hope this is a short term condition.

As you are likely aware, management anticipates a significant increase in foam product sales during 1989 and is spending the majority of plant-allocated funds in the foam section of the business. As a result, a much higher percentage of total maintenance labour time is required in the foam tunnel area.

As well as yourself, we have other maintenance employees with similar medical restrictions. We have an adequate volume of maintenance work in other plant areas to keep these individuals employed but cannot accommodate an additional employee at the present time. In all cases, you have less seniority rights than the other maintenance employees.

Unfortunately, we must remove you from the millwright job until you are either medically fit to

resume work in the restricted areas or an additional millwright is required in non-restricted areas.

Glen, in the near future you will be assigned to another job with due consideration given for seniority rights and C.W.S. qualifications.

As it turned out there was no reassignment. There was sufficient millwright's work to keep the complainant occupied from mid January 1989 until February 1, 1989 when he left work again.

15. On or about January 10, 1989 Mr. Ryerson complained of fumes emanating from the area of a dismantled paint pump in the maintenance shop. Ordinarily there are no isocyanates in the shop. The complainant remained in the office for a couple of hours while the company investigated, then was assigned alternative work.

16. On February 1, 1989 the complainant reported a problem which he said he had encountered while driving a tow motor through an open plant area where there are no isocyanates normally present. The complainant advised Reg Jordan the Industrial Relations Manager that he (the complainant) felt ill and needed medical attention. The complainant testified that he had spoken to a plant technician and concluded that "poison fumes" were coming from a cured formawall panel, and that this was the source of his discomfort.

17. The complainant decided to report to the Ontario Workers' Health Centre which is only a few blocks from the plant. The OWHC referred him on to the McMaster Clinic. Tests performed at the McMaster Clinic showed the complainant to be "normal" at the time they were taken (i.e. about two and a half hours after the alleged exposure incident). The complainant speculated that he must have come into contact with either an airborne isocyanate or some other substance to which he was sensitive, but that by the time McMaster did its tests, the effect had subsided, so the tests were negative. There is no evidence to substantiate the complainant's speculation.

18. From February 3 onwards the complainant was off work pursuant to doctors' notes provided by doctors associated with the Ontario Workers' Health Centre. On February 10, 1989, Dr. Ronald Wong wrote:

"Mr. Ryerson has a health condition in which he will be harmed if he is exposed to solvents and fumes and isocyanates. He is advised to remain off his job until a suitable environment is found for him as a millwright".

This note is similar to that of Dr. Muir the month before except that there is a conclusion of a "health condition" together with the suggestion that the company must find work for Mr. Ryerson "as a millwright" - rather than simply work he was capable of doing without isocyanate exposure.

19. We do not know the basis for Dr. Wong's finding or recommendation. He had no direct communication with the respondent and therefore may not have known that there was work available for the complainant even if he was sensitized to isocyanates.

20. In a "physician's statement" dated February 10, 1989, Dr. Wong estimated that it would be six to eight weeks before the complainant could return to work. In a later statement dated March 11, 1989 Dr. Wong predicted a further six to eight weeks off. In a statement dated April 24, 1989 Dr. A. D. Reinhartz, another OWHC physician, predicted six more weeks off. We do not know what medical investigation if any, was being pursued by these physicians during this period.

21. In a physician's statement dated May 16, 1990 Dr. McLellan, a chest specialist indicated that he was referring the complainant to Dr. Hargreave at the Firestone Clinic for an assessment as

to the complainant's isocyanate sensitivity. Dr. Hargreave is an acknowledged expert in the field and the Firestone Clinic works in cooperation with the McMaster Occupational Health Programme. Dr. McLellan states that he has not been actively supervising the complainant's case, however in his opinion, the complainant is "totally disabled (unable to work)", and his return to work date is uncertain. There was no communication with the company about the nature of its operations or the availability of work which would be safe for the complainant to perform. We do not know the basis for the conclusion that the complainant was "totally disabled (unable to work)".

22. Meanwhile, the company continued to advise the Workers' Compensation Board (WCB) that it had a suitable work environment for the complainant where he would *not* be exposed to solvents, fumes, or isocyanates. Because of the complainant's lack of seniority, this work might not be in his capacity as a millwright, but there was work for him to do even if he had a medically prescribed restriction on exposure to isocyanates. That is the thrust of the company's letter of January 11, 1989, and it has remained its position at all material times. The WCB was interested in the complainant's condition because he had made a compensation claim asserting total disability.

23. In a physician's statement dated June 23, 1989 Dr. Hargreave from the Firestone Clinic indicated a return to work date of July 17, 1989. This was the first firm return to work date that the company had received and, in accordance with its usual practice, Wayne Orr an employee relations officer attempted to contact Dr. Hargreave in order to confirm the date. The company needed a confirmation of the return date in order to slot the complainant into the appropriate shift, with whatever work restrictions might be required. Orr had been involved with the complainant's file and his ongoing WCB claim.

24. On July 12, 1989 Orr reached Dr. Marion Hepperle an associate at the Firestone Chest Clinic. Dr. Hepperle was familiar with the complainant's case. Her advice to the company was both more detailed and quite different from what the company had previously been told.

25. Dr. Hepperle told Orr that the complainant had been to the Clinic the previous week and had refused to participate further in its investigations. According to Dr. Hepperle, the complainant was not appearing on time for appointments, nor was he following the Clinic's instructions. At one point, the clinic "hadn't seen him for months". Dr. Hepperle said that although the complainant's history and complaints suggested a possible sensitivity to isocyanates, there was no *evidence* to support that claim, and she had explained that to the WCB. As she put it, "it was a good story but there was no proof". The complainant had been encouraged to return to work with a small monitoring device that could be checked periodically, however he had refused to participate in this monitoring process. As far as Dr. Hepperle was concerned, the complainant could return to his regular job *without restrictions*.

26. The complainant confirms that he was disappointed with both the testing and the results from the Firestone Clinic, and that he refused to participate in its investigation any further. He testified that as far as he was concerned there were no conclusive results. He told the Board that, in his view "no matter what the results were, they wouldn't be credible". He also testified that he was never advised of the Firestone Clinic results by Dr. Reinhartz of the OWHC nor did Dr. Reinhartz ever discuss any results with him. He testified that he really did not know if there were any results.

27. The complainant did not return to work on Monday, July 17, 1989 or on the following Monday, July 24, 1989.

28. On Thursday, July 27, 1989 the complainant came to the plant and spoke to Wayne

Orr. The complainant told Orr that he was cleared to return to work as of the previous Monday, July 24, 1989 and that a confirmatory Doctor's note was in the mail from the Workers' Health Centre. The complainant said that he could return to work without restriction. This, it will be noted, was consistent with what Orr had earlier been told by Dr. Hepperle.

29. Orr telephoned the Workers' Health Centre that afternoon and spoke to Bonita Clark. Ms. Clark told Orr that the complainant was indeed cleared to return to work as of the previous Monday, July 24, however, she was not sure whether there were any restrictions. She advised that a letter would be available either later that day or the following morning. She said that the week's delay (i.e. from July 17 to July 24) was occasioned by communications difficulties between Dr. Hargreave's office and the Ontario Workers' Health Centre. There had been a delay in getting Dr. Hargreave's test results. She did not explain why the complainant did not or could not appear for work during the week beginning July 24.

30. As we have already mentioned, we do not know what testing, if any, was done by the physicians at the OWHC, and it was certainly reasonable for them to await the findings of the Firestone Clinic, before making any firm recommendation. On the other hand, as far as the company was concerned, it had been advised that the test results were negative and that the complainant could return to work, without restrictions, as of July 24, 1989.

31. The grievor did not report to work for the week beginning Monday, July 31, 1989, or the following Monday, August 7, 1989.

32. On Thursday, August 10, 1989 the complainant came to the plant and presented Wayne Orr with a new note from Dr. Reinhartz of the Ontario Workers' Health Centre. That note is dated August 8, 1989 and provides:

"Mr. Ryerson may return to work. He must avoid isocyanate exposure".

However the complainant told Orr that, despite the note, he did not wish to return to work that week. The complainant asked that the week of August 8-11 be treated as holidays. Orr replied that he was not authorized to grant vacation requests. He told the complainant that the issue should be taken up directly with David Rowthorn, the Production Manager.

33. Orr brought these matters to the attention of David Rowthorn and Reg Jordan and was told to seek clarification from the complainant's Doctors about both the unexplained period following July 24 and the extent of the complainant's isocyanate restriction. From the company's perspective, the most recent note was no different from the one provided by Dr. Muir eight months before while, in the meantime, the complainant had been off work and purportedly unable to do any work at all because of an isocyanate sensitivity. Dr. Hepperle from the Firestone Clinic had recently advised that, after testing, there was no evidentiary basis for that claim, yet Dr. Reinhartz was, once again prescribing an isocyanate restriction. Dr. Reinhartz's opinion had allegedly been delayed because of the late delivery of results from Dr. Hargreave and was purportedly based upon those results, but the company had been told that those results were *negative*: they did not establish any isocyanate sensitivity, nor warrant any special work restrictions. And, during all of this period the company had work available which would not have exposed the complainant to solvents fumes or isocyanates in any event. Finally, when the complainant did eventually show up for work, two weeks later than the anticipated return date, he had no explanation and asked for more time off as holidays. Jordan and Rowthorn decided to press the complainant for an explanation, and to invoke article 6.07 if a satisfactory explanation was not provided. The company was prepared to defer to the doctors' opinions for the period preceding July 24, but for the period there-

after, the company wanted affirmative medical evidence that there was reasonable cause for the complainant's continued absence from work.

34. Around this period (the witnesses were not sure of the date but it was probably on August 10) there was a brief meeting involving the complainant, David Rowthorn, and a union official. Reg Jordan had occasion to look in on that meeting, which Jordan described as a heated discussion about Mr. Ryerson's situation. Jordan took the opportunity to make it plain to the complainant that the company was concerned about the medical statements it had received, and, in particular, the period following July 24 when the company understood the complainant to be capable of returning to work (albeit perhaps with restrictions) but he had not in fact reported for work. Jordan stressed that the company required medical verification for that period of absence. The grievor replied that there should be no trouble providing such information.

35. The complainant did not report for work on Monday, August 14, 1989 or Tuesday, August 15, 1989.

36. On Wednesday, August 16, 1989 the complainant appeared at the company's premises and demanded a meeting. There was no advance notice, nor did the complainant indicate what the meeting was to be about; however the complainant did ask for the presence of union officials and safety representatives.

37. The complainant's vacation request was the first item discussed at the meeting, and the company, once again, linked the vacation authorization to its demand that the complainant provide medical verification for his alleged inability to return to work after July 24. By this time, of course, the grievor had already taken off the days in question without authorization. The only issue was whether such authorization would be given after the fact.

38. The complainant told the company officials that he could provide the required medical verification, but that he was refusing to work pursuant to section 23 of the *Occupational Health and Safety Act* because the entire plant constituted an unsafe environment. The complainant indicated that he was not prepared to work in any part of the plant without a guarantee of safety, nor was he prepared to participate in any inspection of the plant premises. He said he would wait outside while such investigation was undertaken. The complainant testified that he did not believe that the company had undertaken periodic plant-wide isocyanate testing, which he believed to be legally required. He said that he did not know what he was "walking into" and feared for his safety.

39. The complainant was closely cross-examined on this point. He was reminded that on August 10 he had expressed a desire to return to work and raised no concern at all about his health, yet on August 16 he claimed the entire plant was so hazardous he could not even accompany the government inspectors to facilitate their investigation. He was also reminded that if the workplace were totally unsafe for someone with his alleged health condition, he might not be able to claim reinstatement. If there was, in fact, no work that he could safely perform anywhere in the plant he is simply unsuitable and has lost nothing from his termination; (or to put the matter more accurately: he is left to persuade the WCB that he has a valid disability claim). The complainant was asked how it was that the plant (or a part of it) was safe at the time of the hearing but was not safe on August 16, 1989.

40. The complainant did not have a very satisfactory reply. He said that he thought the entire plant was unsafe because he did not think the company had done certain testing which he believed to be legally required, to ascertain the presence of isocyanates. He assumed that the company has now done such testing so the plant is now safe for him. However, there is no evidence

about what testing the company has done or might be legally obliged to do, no evidence that he raised that particular concern with the Ministry of Labour officials, and, if he did, no indication in their report of any default on the employer's part. Nor is it clear how any of this justifies the complainant's blanket work refusal on August 16 or his absence between July 24 and August 16. The company was accommodating other workers with specific sensitivities, was prepared to accommodate the complainant, if necessary, and was already participating in a medical program to monitor and avoid isocyanate problems. As company counsel put it: the complainant's doctors, after extensive testing and discussion had authorized his return to work. What did the complainant allegedly know (or fear) that his doctors did not? Obviously, isocyanates are dangerous chemicals which must be handled with care, but their mere presence in the workplace does not, in itself, warrant a blanket work refusal, nor, in the complainant's case justify his actions on August 16.

41. After a short discussion those present at the August 16 meeting decided to follow the steps prescribed by the *Occupational Health and Safety Act* and summon an inspector from the Ministry of Labour. C. Brand, the Plant Chemist contacted the Industrial Health and Safety Branch and advised that the complainant was refusing to work because of possible exposure to isocyanates from handling cured formawall panels. This was the only concrete concern which the complainant had identified. Mr. Brand expressed the opinion that it was exceedingly unlikely that unreacted isocyanate or isocyanate vapour would be present in fully cured panels, however the Ministry was invited to investigate and make its own assessment.

42. Ministry Officials appeared the following day to conduct their investigation. The details of that investigation are summarized in a memorandum dated September 6, 1989 and need not be repeated here. It suffices to say that the investigation involved a joint hygienist-medical team which entertained all of the parties' representations, considered the complainant's work history and conducted its own independent enquiry. In their report, K. Oliver (Hygienist) and Dr. B. Campbell conclude:

Based on information obtained at the visit, and on subsequent analysis of cured foam, it is concluded that the work areas in which the refusee would be expected to work, namely, the main building production area, the coil warehouse, the roll forming building, the paint shop, and the shipping and receiving department are considered safe for the average normal healthy worker in respect to isocyanate exposure. However, a worker who is sensitized to isocyanate, may react to minute levels of MDI in the air, that is at levels which are well below the exposure standard. The decision as to whether a worker is sensitized to isocyanates must be made by the worker's examining physician only after receiving a report of further assessment.

Because the refusee declined to sign a consent form for release of relevant medical information, from the refusee's examining physician(s) to the Ministry of Labour medical consultant, the medical information is incomplete; therefore, the investigating HSSSB medical consultant is unable to deem that the work locations in question, are likely to endanger the refusing worker.

Should further medical information be provided, confirming the sensitization of the refusee, then this decision will be reviewed.

43. Counsel for the employer asked the complainant why, if he feared a substance to which he was particularly sensitive, he did not authorize the inspection team to explore that problem with his doctors. After all, for some months those doctors had been considering both his alleged isocyanate sensitivity and his ability to work. The complainant told the Board that he did not trust the Ministry of Labour. Company counsel submits an alternative explanation: the complainant knew that his work refusal was illegitimate and that his assertions would no longer be supported by his doctors.

44. For completeness we might here mention the opinion of the claims branch of the WCB

which, at the time, was considering the complainant's compensation claim. The company was aware of the WCB's opinion prior to the complainant's termination. In a letter to the complainant dated August 15, 1989, an Official of the WCB said, in part:

All the available medical information was reviewed by the Occupational Disease Department. This included the emergency hospital reports under the previous two claims, all available reporting from Dr. Muir of McMaster University and the reports from your visits to Dr. Hargreave. The Specialist was able to perform some tests on you, but these did not confirm a relationship between your disability and any exposure to isocyanates at work. The Specialist was unable to carry out further testing because of your refusal of these. As a result, no medical opinion can be rendered on the compatibility of your disability to your employment history, at this time.

Also, your employer has confirmed they had at least two alternative jobs available to you which would not involve exposure to isocyanates, as directed by your physician. The information on file does not support that you are totally disabled as of February 3, 1989. As your employer is able to provide you with suitable alternative work, there would be no entitlement to temporary total or temporary partial benefits, as of February 3, 1989.

[emphasis added]

45. On August 16, 1989, the company sent the complainant this letter:

The Company was advised by the Ontario Workers' Health Centre that you were able to return to work on July 24, 1989. You submitted a note on August 10, 1989 from the Ontario Workers' Health Centre dated August 8, 1989 that stated you could return to work. It did not specify the return to work date.

On August 10, 1989, you asked Wayne Orr if Vacation from August 8, 1989 to August 11, 1989 (inclusive) could be granted. Mr. Orr referred you to the writer for vacation authorization. You did not seek such authorization.

At approximately 9:45 a.m. on August 16, 1989, you requested a meeting at which, Mr. J. McSweeney-Chairman Health and Safety Committee Local 4166, T. Dawson-Chief Steward Local 4166, C. Brand-Company Chairman Health and Safety Committee, Wayne-Orr-Employee Relations Officer, K. King-Maintenance Foreman, and D. Rowthorn-Production Manager, were in attendance.

The writer advised you that a Doctor's note to cover illness from July 24, 1989 to August 8, 1989 was required within three days. You indicated that you could comply with this requirement.

You stated that you were returning to work today (August 16, 1989) but refused work for Health and Safety reasons.

You submitted [sic] note dated August 8, 1989 [sic] implied that you could return to work *no later* than the day after obtaining the note. You did not report for work within seven calendar days after that and are therefore subject to termination. (Article 6:07 Collective Bargaining Agreement).

In the interest of harmonious employee/employer relations, the Company will grant vacation from August 8, 1989 to August 11, 1989 and consequently eliminate [sic] the unauthorized absence associated with these days if you present an acceptable Doctor's note which certifies your illness for the period July 24, 1989 to August 8, 1989 by August 21, 1989. To clarify the word "acceptable" we would require written confirmation that, contrary to the opinion of the medical authorities at the Ontario Workers' Health Centre, there was a further overriding medical reason for your non attendance at work.

Please note that your employment at H. H. Robertson Inc. is terminated if you do not comply with the above.

46. The complainant testified that he received the company's letter and understood its con-

cern about the period following July 24, but thought that all that was necessary was a note from his Doctor that specifically stated that he was cleared to return to work as of August 8. We do not accept this testimony. In view of what was said on August 10, repeated at the meeting of August 16, and confirmed in the letter of the same date, the complainant could have been under no illusions about the company's concern or what he was required to do to meet it.

47. The complainant testified that he did not bother to show the August 16 letter to Dr. Reinhartz nor did he ask Dr. Reinhartz to deal specifically with the period July 24 - August 8 about which the company was concerned. On August 17, 1989 Dr. Reinhartz gave the complainant this note:

“Concerning my note of August 8, 1989 on Mr. Glen Ryerson: he may return to work *as of August 8, 1989*, and must avoid isocyanate exposure.”

There was no explanation for the complainant's absence from July 24 to August 8, or from August 8 to August 16.

48. On August 18, 1989 Wayne Orr told the complainant that the company wanted to know why the return date of July 24 had been changed to August 8 (if indeed it had). Mr. Ryerson replied that, in his view, the note was adequate and he did not intend to bother the doctor further. The company, however, did its own follow-up with Dr. Reinhartz.

49. On August 21, 1989 the company sent the complainant this letter:

We acknowledge receipt of your note dated August 17, 1989 from the Ontario Workers' Health Centre bearing the signature of Dr. A. Reinhartz.

The requirement of written confirmation that medical reasons prevented your return to work from July 24, 1989 to August 8, 1989 was not included in the note. The Company contacted Dr. Reinhartz on August 21, 1989 regarding your return to work date. *Dr. Reinhartz stated that he knew of no medical reasons why you could not return to work on July 24, 1989.*

The Company feels justified in severing the employment relationship but is willing to extend the period for submission of an acceptable Doctor's note.

Termination of your employment will remain in effect if you do not submit such a note, complete with overriding medical reasons for your non attendance at work from July 24, 1989 to August 8, 1989, *by August 25, 1989.*

[emphasis added]

50. On August 24, 1989 Wayne Orr had occasion to speak to the complainant and remind him that his termination was not effective until August 25 and that discharge could be avoided if he provided appropriate medical evidence for the period in question. The complainant did not do so. As of the completion of the hearings, the complainant has still not provided the information which the company sought, nor did the complainant call Dr. Reinhartz to clarify or contradict what Reinhartz is alleged to have said to the employer. In the circumstances we feel justified in concluding that the conversation was as recorded and recounted by the company.

51. We emphasize, once again, that we are not in a position to determine whether what Reinhartz told the company was true, any more than we can determine whether what Dr. Heperle said was correct, or whether the WCB assessment was accurate, or whether the Health and Safety Inspectors' conclusion was warranted. But all of these judgements were available to the company at the time it decided to discharge the complainant, and they all point to the same infer-

ence: for the period after July 24, there was no medical basis for the complainant's continuing absence from work.

52. The complainant filed a grievance alleging that he had been discharged without just cause, however, pursuant to section 24(2) of OHSA, the complainant has elected to bring his case to the Ontario Labour Relations Board.

III

53. The respondent acknowledges the legal onus upon it, but argues that the complainant's discharge was wholly unconnected with his alleged safety concerns or the work refusal on August 16. The discharge did not occur "because" the complainant was engaged in protected activity. In fact, counsel submits, *the work refusal* occurred "because" there were mounting grounds for discharge and the complainant knew it. The "writing was on the wall": the company was suspicious, and the complainant knew that if pressed, his doctors would not support his absence after July 24. His only option was to find some other reason for not coming to work - first the holiday request, and later the spurious claim that the entire workplace was unsafe. The respondent argues that there was no breach of section 24(1) and no factual or legal basis for applying 24(7).

54. Counsel asserts (despite Board cases to the contrary) that a breach of section 24(1) is a prerequisite before 24(7) can be applied; and in any case, the complainant cannot invoke 24(7) when his discharge was not related to safety *at all*. As counsel puts it: this is a *safety* statute, and the Legislature could never have intended the "free arbitration" of a discharge imposed for reasons entirely unrelated to safety. In the alternative, the employer contends that there is no equitable basis for granting relief, where the complainant has abused the right to refuse unsafe work protected by section 23 of the OHSA. Counsel proposes a simple test: if the matter is "about safety", then the Board may intervene, but if the employment consequence complained of is not motivated, at least in part, by "anti-safety" animus, no 24(7) remedy is available. An employee is left with his/her remedy, if any, at arbitration. Indeed, counsel asserts that the Board may deal only with the safety aspects of the situation, and it is up to an arbitrator to deal with anything else - even if that means two tribunals considering the facts surrounding the discharge.

55. The complainant replies that his termination *was* motivated, at least in part, by his work refusal on August 16. The coincidence in time is too striking to ignore, and termination is not even contemplated by the wording of article 6.07 upon which the company purports to rely. Counsel argues that it was reasonable for Mr. Ryerson to be worried about his work environment and to conclude that his termination occurred because he expressed those worries; moreover, he is protected by 24(7) even if it turns out that he was wrong or unduly cautious. Counsel urges the Board to bear in mind the inherent danger of isocyanates, the complainant's work experience, and the concerns of the various physicians who have considered his condition. In the complainant's submission, there is a breach of section 24(1), but even if the Board decides otherwise, there is no basis for the complainant's termination and 24(7) permits the Board to intervene. In enacting 24(7) the Legislature intended that the Board deal with "the whole ball of wax", just as an arbitrator would do, and in this case, there is no just cause for discharge.

IV

56. Before turning to legal considerations, it may be useful to summarize our conclusions of fact. As we have already mentioned, in reaching those conclusions, we have taken into account both the witnesses' relative credibility, and what appears to us to be most probable in all the circumstances. On that basis, therefore, we make these findings:

1. The complainant was not discharged because of his work refusal on August 16, 1989 or because he was acting in accordance with or was seeking compliance with the *OHSA*. He was discharged because he was absent from work for more than seven days without reasonable cause. With growing scepticism about the complainant's various doctor's notes, the company decided *prior to August 16*, that if he did not provide medical justification for his latest period of absence he would be discharged. He did not. He was.
2. The complainant did not provide either his employer or the Board with a reasonable explanation for his absence.
3. On August 16, 1989, the complainant had neither a reasonable nor *bona fide* belief that the workplace was unsafe for him. There was no *bona fide* exercise of rights pursuant to section 23 of the *OHSA*, and no *bona fide* effort to seek compliance with the *OHSA*.
4. The grievor had no reasonable basis for refusing to cooperate in the investigation process which his work refusal had triggered; and, in particular, there was no basis for refusing to share medical information with the team from the Ministry of Labour.
5. The complainant did honestly believe that his work refusal on August 16 had at least something to do with his discharge that day, even though we have found otherwise. To that extent, *the complaint itself* has not been made in bad faith or for any improper purpose. It falls within the potential ambit of section 24(1), even though the work refusal itself was unjustified.

V

57. The origins and purpose of the *OHSA* have been canvassed at some length in *Inco Metals Co.*, [1980] OLRB Rep. July 981, in a long passage to which we might usefully refer:

44. The foregoing provisions give, for the first time, an employee a statutory right to refuse to perform work in unsafe conditions without fear of reprisal from his employer. This Board must interpret and apply the Act bearing in mind the shortcomings of the pre-existing law that it was designed to remedy. Arbitral jurisprudence had previously provided some protection to employees governed by a collective agreement under which they may only be discharged for just cause. Arbitrators have traditionally adjudicated whether the refusal to perform work that is unduly dangerous is just cause for the discipline or discharge of an employee. (*Re Steel Co. of Canada Ltd.*, (1973), 4 L.A.C. (2d) 315 (Johnston); *Re Mueller Ltd.* (1974), 7 L.A.C. (2d) 282 (Hinnegan); *Re International Nickel Company of Canada Ltd.*, (1968), 19 L.A.C. 118 (Weatherill)).

45. It is also arguable that at common law it was the right of an employee to refuse to perform work in conditions that are so dangerous as to be unlawful. In fact that protection has proved illusory [sic]. Firstly, safety laws and regulations might not cover the many kinds of situations that arise in different industrial settings. As a result even though the law of master and servant might prohibit the discharge of an employee for a refusal to perform work that is unlawful, the lines of illegality were often blurred and sometimes non-existent. Secondly, there was no ready, practical procedure by which a rank and file employee could vindicate his common law right not to be discharged for a refusal to perform unlawful work. The time and cost of civil litigation to enforce that right effectively put it out of the reach of the very employees who most needed it.

46. There are several obvious shortcomings to collective agreements as an exclusive means of

protecting the safety of workers. Firstly, that protection extends only to those employees who are organized. It is not available to the substantial number of employees who do not have trade union representation or a collective agreement. And even for organized employees that protection can be uncertain or sporadic. A union, with control over the decision to file a grievance, may not agree with a complainant's view of what is unsafe. And to the extent that a collective agreement may lapse during the "no contract" period, the right to file a safety grievance is suspended. (See, *Re Communications Union Canada and Bell Canada* (1979), 23 O.R. (2d) 701 (Div. Ct.)). The arbitration mode has also been criticized in that the focus of attention is primarily on discipline, and only indirectly on safety. (See, Ison, *Occupational Health and Wildcat Strikes*, (Reprint Series No. 45, Industrial Relations Centre, Queen's University)). Moreover, collective agreements may not provide the kinds of safety policing mechanisms incorporated into *The Employees' Health and Safety Act*. As a result, when a grievance over discipline for the refusal to perform unsafe work reaches an arbitrator the evidence may be less finely tuned because of the absence, during the precipitating incident, of input by health and safety committee members from both management and employee ranks. The evidence, and the practical possibility of resolving the problem, can also suffer without the objective input of qualified government safety engineers and inspectors. The enactment of *The Employees' Health and Safety Act*, can, therefore, be viewed as confirmation that the Legislature recognized that industrial arbitration and the common law did not provide adequate protection to employees confronted with unsafe working conditions.

47. It would appear that previous statutory protection was also found to be inadequate. The main vehicle of worker protection was *The Industrial Safety Act, 1971*, S.O. 1971, c. 83. A wide ranging statute that had grown into a creaky machine, it had its origins in the late nineteenth century response to abuses of the industrial revolution. First enacted as the *Ontario Factories Act, 1884* (47 Vict. c. 39) it became *The Factory Shop and Office Building Act, 1913* (3 & 4 Geo. V. c. 60). Until its repeal by *The Industrial Safety Act, 1964*, S.O. 1964, c. 45 s. 39; *The Factory Shop and Office Building Act* grew, piecemeal, into a catch-all of protections for employees. It forbade the employment of children. It provided a registry to monitor the employment of youths, young girls and women. Among other things it regulated hours of work, required that young girls and women be supplied with chairs and made general provisions for adequate lighting, heating, fire escapes, ventilation and cleanliness in work places. It was not, however, within the power of employees to enforce the legislation. Enforcement required the order of an inspector who could either order corrective measures or close down an operation if necessary. As late as 1964 an employer in breach of a provision of the Act was liable to be fined not more than \$200.00 for an offence.

48. At the same time a panoply of other statutory provisions evolved to govern health and safety in particular areas of industry. Among these are *The Operating Engineers Act*, R.S.O. 1970 c. 333; *The Public Health Act*, R.S.O. 1970 c. 377; *The Elevators and Lifts Act*, R.S.O. 1970 c. 143; *The Boiler and Pressure Vessels Act*, R.S.O. 1970 c. 47; *The Workmen's Compensation Act*, R.S.O. 1970, c. 505; *The Power Commission Act*, R.S.O. 1970, c. 354, *The Construction Safety Act*, R.S.O. 1970, c. 81; *The Construction Hoist Act*, R.S.O. 1970, c. 80; *The Mining Act*, R.S.O. 1970, c. 274; *The Silicosis Act*, R.S.O. 1970 c. 438; *The Loggers Safety Act*, S.O. 1962-62 c. 76; *The Energy Act*, S.O. 1971, c. 44; *The Department of Labour Act*, R.S.O. 1970 c. 117; *The Gasoline Handling Act*, S.O. 1966 c. 61. While legislation in particular areas of hazard such as those covered by the foregoing statutes is necessary, the enactment of *The Employees' Health and Safety Act* reflects the Legislature's view that the trade-by-trade method of legislation can never be sufficient. Such particularized legislation tends to be enacted in response to, and not in anticipation of, safety and health problems that arise as new technologies are introduced into the work place. Because of the rate of technological evolution, with new processes, chemicals and machinery being introduced into places of employment on an almost daily basis, the important protection of these specialized safety statutes can never entirely keep up. Moreover, such legislation is often effective only to the extent that it can be enforced by the limited resources of government inspection and monitoring. Perhaps the greatest shortcoming of trade-by-trade legislation is that such laws tend to cover only the most pressing and high profile areas of hazardous work.

49. Before the passage of *The Employees' Health and Safety Act*, there was a growing awareness that the common law protections, traditional collective bargaining mechanisms and safety laws and regulations tied to specific industries simply weren't adequate. In Ontario a Royal Commis-

sion found serious shortcomings in safety enforcement mechanisms then in place. (Ont. *Report of the Royal Commission on the Health and Safety of Workers in Mines* (Toronto, Queen's Printer, 1976 - Ham Report)). The report expressed concern that there had been 213 fatalities recorded in the Province's mining industry in the decade 1965-74. The frequency of fatalities per man-hours worked in logging, sawmilling and veneer milling was found to be twice as high. (See *Report of the Royal Commission* p. 131). The Legislature obviously shared the conclusion of the Royal Commission that existing health and safety laws and procedures were inadequate to prevent what had become an unacceptably high toll of industrial fatalities and injuries in the Province. The Report, which became the impetus for reform legislation, is notable for its depth of research and the strength of its conviction that the most important thing to come out of any production facility is the production worker himself.

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53. In Ontario the right to refuse unsafe work was viewed by the Legislature as sufficiently important to be incorporated as an express provision in *The Employees' Health and Safety Act*. It has been continued in successor legislation, *The Occupational Health and Safety Act, 1978*, S.O. 1978, c. 83, ss. 23, 24. Given the history and purpose of the statutory right of workers to refuse to perform unsafe work, the provisions of section 2 of *The Employees' Health and Safety Act*, must be given a liberal and constructive interpretation that is consistent with the intention of the legislation.

58. The OHSA is a remedial package which creates new rights and imposes important responsibilities on all members of the workplace. A worker is required by section 17 to work in accordance with the Act and its Regulations, and to report any contravention or hazard to his/her employer. A worker is prohibited from working in a manner which may endanger himself/herself or other workers. A worker has a right to refuse unsafe work in circumstances set out in section 23, and is protected from reprisals by section 24. A worker is expected to question, to ask for information and assurances, and, if necessary, to seek the intervention of the Ministry of Labour, even if that involves some incidental interference with ongoing production. A safe work environment is everyone's responsibility.

59. As a result of the *Occupational Health and Safety Act*, a worker is no longer confined to the legal regime established at common law or under the terms of a collective agreement, for as the Board observed in *Inco* it was a dissatisfaction with the legal *status quo* which prompted the passage of the OHSA in the first place. Under the OHSA, a worker's rights are *statutory* rather than *contractual*, and the Ontario Labour Relations Board has been given new responsibilities to give effect to them. The legislation is more than a bundle of individual rights, worker protections, regulations and penal provisions. It is an integrated whole designed to bring to light and resolve safety concerns. It introduces a new *process* which supercedes what went before.

60. Against that background, there is no obvious reason why the Board should defer to, or prefer the piecemeal approaches of Courts or arbitrators, unless the language of the legislation and utilitarian considerations clearly point in that direction. Rather, we think we should interpret the statute in a manner most likely to promote workplace safety, and most likely to provide an expeditious, economical and final resolution of workplace disputes.

61. In the instant case, the interpretation of section 24(1) poses no real difficulty because we have found that the complainant was not discharged *because* he was engaging in protected activity. He was discharged *because* he did not establish reasonable cause for his absence from work. There is no breach of section 24(1).

62. But is that the end of the matter? Having established that Mr. Ryerson's termination is neither illegal nor "safety related", can the company demand that his complaint be dismissed? Or does the Board still have to consider section 24(7) of the Act? And if section 24(7) is engaged, is

this an appropriate case to exercise our discretion in the complainant's favour? In answering those questions, it is helpful to examine the structure of section 24, when read in light of the general approach and policy considerations to which we have already referred.

63. Section 24(1) defines the worker's substantive rights. It prohibits an employer from penalizing a worker who has acted in, or sought compliance with the Act. But section 24(1) does not require that the employer establish "just cause" for its position. The presence of cause may bolster an employer's explanation for its actions, just as the absence of cause may suggest an improper motive, however, under section 24(1) "just cause" or "fairness" are not the primary focus. The issue is: was the employment consequence complained of imposed "because" the worker was engaged in legally protected activity. That is a question of motive.

64. On the issue of motive, the Board has adopted an approach similar to that applied in unfair labour practice cases: if the employer was improperly motivated *in whole or in part* its actions are illegal (in this regard see, *R v. Bushnell Communications Ltd. et al* (1973) 1 O.R. (2d) 442 (H.C.J.); 4 O.R. (2d) 288 (C.A.); *Westinghouse Canada Ltd.*, [1980] OLRB Rep. April 577, affd. by the Divisional Court 80 CLLC 14062). The safety issue need not be the only or even the dominant employer motivation. It is sufficient if it is one of the reasons for the employer action under review. (See *Commonwealth Construction*, [1987] OLRB Rep. July 961 and more recently, *Bilt-Rite Upholstering Co. Ltd.*, [1990] OLRB Rep. July 755.)

65. Sections 24(2)-(6) set out the way in which an aggrieved employee may seek a remedy for an alleged infringement of statutory rights. Under section 24(2) a worker in a unionized setting has the option (with union support) of pursuing an allegation of a breach of 24(1) before an arbitrator or bringing a complaint to the Ontario Labour Relations Board. If the collective agreement requires an employer to establish "just cause" for employee discipline, the arbitration mechanism under that agreement may already provide an equally expeditious, economical, final, and binding resolution of the matter in dispute. Indeed, quite apart from section 24(1), the "just cause" umbrella may already be broad enough to address all of a worker's concerns - particularly if an arbitrator interpreting the term "just" is disposed to consider the general law (see *Re Lancia Bravo Foods and UFCW Local 530P* (1990) 11 L.A.C. (4th) 59 (Burkett)); moreover, if the dispute involves a strong element of contract interpretation, arbitration may be an attractive option even if safety issues are part of the factual mix. Pursuant to section 44(9) of the *Labour Relations Act* (in the absence of a "specific penalty") an arbitrator already has the authority to adjust a disciplinary penalty if it seems advisable to do so, and the parties may consider it desirable to select an arbitrator with whom they are comfortable or with a particular understanding of their work environment. Finally, grievance - arbitration has the virtue of familiarity: the machinery is already in place, and workers can be expected to either know about it, or get help from their union.

66. None of this is new, of course. The Legislature has merely preserved an option that was available to unionized workers prior to the passage of the OHSA and may well be broader than 24(1). However, there is nothing to suggest that arbitration is the preferable course in any particular case. It is up to the employee to choose the route s/he considers most appropriate, and superficially at least, it appears that the two alternatives have similar adjudicative and remedial functions. They are both intended to produce a "final and binding" resolution of the workplace dispute under review.

67. If a worker opts to proceed before the Ontario Labour Relations Board, section 89 of the *Labour Relations Act* is incorporated by reference so the matter is dealt with very much like an unfair labour practice. Pursuant to section 89(2), the Board appoints a Labour Relations Officer to meet with the parties to endeavour to effect a settlement. Failing settlement, the matter proceeds

to a hearing. If a violation of section 24(1) is established, the Board has authority under section 89(4) to fashion an appropriate remedy. Section 103 of the *Labour Relations Act* gives the Board a variety of statutory powers, and sections 106 and 108 ensure that the decision of the Board is “final and binding for all purposes”.

68. Section 89(4) deserves further comment, because the Board’s remedial authority is both comprehensive and operates “notwithstanding the provisions of any collective agreement” (see paragraph 5 above). The Board’s jurisdiction is rooted in the statute and as in the case of unfair labour practices, its exercise may involve policy considerations. In *Radio Shack*, [1979] OLRB Rep. Dec. 1220 at p. 1253, the Board observed:

It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop “boiler plate” remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable; they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation. Remedies should also be sensitive to the interests of innocent bystanders. This means then that the Board should try and tailor remedies to each particular case. It is equally true, however, that the Ontario Labour Relations Board cannot police the entire labour relations arena. As important as it is for this Board to safeguard the substantive rights it administers, ultimately, compliance with the Act depends on the vast majority of unions and employees according at least minimal respect to the legislation, the Board and the Board’s directives. With its limited resources and the time that must be taken to adjudicate fairly issues of controversy, the Board must rely on the co-operation of employers and trade unions in the day to day administration of the Act. For this reason, the Board cannot get too far ahead of the expectations of the parties it regulates. It must be concerned that its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible. It has therefore been said that the ideal Board order must be both an instrument of education and of regulation. See generally St. Antoine, “A Touchstone for Labor Board Remedies” (1968), 14 Wayne L. Rev. 1039; Ross, “Analysis of Administrative Process under Taft-Hartley”, [1966] Lab. Rel. Yearbook 299.

On judicial review of that decision the Divisional Court said:

“So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award of damages is novel, that the remedy is innovative, should not be a reason for finding it unreasonable”.

(See *Radio Shack*, 80 CLLC ¶14017.) It is that perspective that the Board brings to both the interpretation of section 89(4) and its application where there has been a breach of section 24(1).

69. Given the wording of section 89(4), it is clear that, *apart altogether from section 24(7)*, the Board has considerable flexibility to adjust the remedy to the facts of the case before it, including situations of mixed motive or concurrent cause. That flexibility is available “where the Board is satisfied that an employer ... has acted contrary to this Act...” It requires a breach of the Act, but once that breach is found, the Board can give a broad remedy or none, *without any reference to 24(7)*, and notwithstanding the terms of a collective agreement including any terms prescribing a “specific penalty”. Accordingly, if section 24(7) is to mean anything at all, it must be seen as an *additional* grant of remedial authority which can be exercised when 24(1)/89(4) are not available; that is, where the employer was *not* improperly motivated and there is no breach of 24(1). That is the conclusion the Board reached in *Commonwealth Construction*, *supra*:

34. As noted, counsel for the respondent contended that subsection 24(7) only applies if the Board finds a contravention of subsection 24(1). We do not find that submission to be persuasive. We interpret subsection (7) as giving the Board jurisdiction, in circumstances when the Board finds that the employer has not violated subsection 24(1) of the Act, to substitute such other penalty as to the Board seems just and reasonable in all the circumstances. In this respect we follow the approach taken by the Board in numerous prior cases (see for example *Baltimore Aircoil of Canada*, [1982] OLRB Rep. March 327; *Inco Metals Company*, [1982] OLRB Rep. Sept. 1315; *Toronto Transit Commission (Wilfred George Love, Complainant)*, [1985] OLRB Rep. Feb. 344; *Camco Inc.*, [1985] OLRB Rep. Oct. 1431; *The Corporation of the City of Ottawa*, [1986] OLRB Rep. June 798). If subsection 24(7) only applied if subsection 24(1) had been contravened, it would be redundant, as the Board already has such power in these circumstances, by virtue of subsection 24(3), which makes all of the subsections of section 89 of the *Labour Relations Act*, except subsection (5), applicable with all necessary modifications to a complaint filed under subsection 24(2). Thus, the Board's power to remedy the contravention of subsection 24(1) by, for example, substituting a lesser penalty, would come from subsection 89(4) of the *Labour Relations Act* as incorporated into section 24 by subsection 24(3).

35. As well, the wording of subsection 24(7) on its face gives the Board the jurisdiction to substitute such penalty as the Board considers just and reasonable, even though the Board has not found the employer to have violated subsection 24(1) and even though the Board "determines that a worker has been discharged or otherwise been disciplined by an employer for cause". In circumstances such as those in the instant case, where the Board has determined that the employer has not breached the Act in its discharge of an employee, it is both sensible and in accord with the specific wording of subsection 7 for the Board to then inquire whether the employer's disciplinary response was nevertheless appropriate in all the circumstances. Under subsection 24(2), a worker under a collective agreement has a choice of adjudicative forum where a contravention by an employer of subsection 24(1) is alleged, and the worker may elect to have the matter dealt with either by arbitration or by filing a complaint with this Board. The Legislature has set up a mechanism under section 24 whereby the worker can have both the occupational health and safety allegation and the merits of the discipline dealt with in one forum, either final and binding arbitration or through a complaint to the Ontario Labour Relations Board. The scheme of section 24, the impact of subsection 24(3), and the language used in subsections 24(2) and 24(7), support the view that the legislature intended that the adjudicative forum chosen by the worker would deal with both the alleged breach of section 24(1), and, in the event the adjudicative tribunal found the employer had not breached the Act, with the issue of whether the specific penalty imposed by the employer for cause was just and reasonable in all the circumstances. No valid labour relations purpose would be served by reading section 24(7) to any other effect.

70. Notwithstanding the submissions of the employer in this case, the view expressed by the Board in *Commonwealth Construction* (as well as the cases referred to therein) is neither novel nor inventive. It rests on the structure of section 24 and the simple proposition that section 24(7) means what it says: section 24(7) relief is available "on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2)" just like the "reverse onus" provision (section 24(5)), and the privative clause incorporated by section 24(4). It is the inquiry itself that makes these powers available, not a particular finding of illegality as is the case with section 24(1)/89(4). Quite frankly, we do not see how the words that the Legislature has used can mean anything else, or why 24(7) is necessary at all if not to supplement the authority provided by 24(1)/89(4). (By way of contrast, compare the "no reprisal" language in the *Environmental Protection Act*, which, like the *Labour Relations Act*, has no equivalent to section 24(7).) Section 24(7) gives the Board a discretion to review a disciplinary penalty even though there was no improperly motivated reprisal and thus no breach of section 24(1).

71. We shall consider below the exercise of the Board's discretion in the circumstances of this case. At this point, we note only that the remedial authority under 24(7) is identical to that of an arbitrator under 44(9), and it certainly looks as if the arbitrator and the Board are expected to do the same thing: consider the propriety and fairness of the employment consequence under

review in light of “all the circumstances” including the terms of the collective agreement. Unlike section 89(4) which operates notwithstanding the terms of a collective agreement, the terms of the collective agreement are an important (although not the only) “circumstance” to be considered, and where a specific penalty is provided those terms will be determinative. That inquiry may well carry the adjudicator into considerations of ambiguity, extrinsic evidence, past practice, known workplace rules, established disciplinary procedures and so on. Justice and equity in an organized context may also require some consideration of seniority, or established collective bargaining principles such as the desirability of “progressive discipline”. All of these matters are “circumstances” which the Board may wish to consider along with any factors intrinsic to a safety statute and its objectives. The Board’s role parallels that of an arbitrator; however, this is not such a surprising result when an organized worker has the *option* of having his employment consequence reviewed by an arbitrator *or* the Board, and the language of section 24(7) mirrors that of section 44(9) of the *Labour Relations Act*.

72. There are both policy and practical reasons for this legislative approach.

73. To say that the Board can only deal with those “matters” or parts of the problem which are “safety related” ignores the fact that this cannot be readily determined in advance, or in cases of mixed motive, or where, as here, a worker could reasonably believe that his discharge was motivated, at least in part, by his work refusal. After the case is over, an adjudicator may highlight certain features of the evidence, draw inferences about the employer’s “real motive”, and determine the legal result. But a worker cannot be expected to do that, or to reliably guess at the employer’s motive lest, at the end of the day, s/he discovers that it wasn’t a safety-related reprisal after all, and therefore should have been dealt with at arbitration. Section 24(5) is in the *OHS Act* because the worker will *not* know what the employer’s real motive is, nor is an employer with an illegal motive likely to be very open about it. An employer who chooses to defend a 24(1) charge will always assert some innocent cause for the employee discharge or discipline, and a worker without legal training may have some difficulty distinguishing mere “injustice” contrary to the collective agreement from “statutory illegality” - especially when the latter may involve nice questions of mixed motive and proximate or concurrent cause. And, of course, to the extent that an employer is able to bifurcate the proceeding or derail the inquiry into a process over which it has more control, the employer can impose both cost and delay upon the aggrieved worker - something section 24 was designed to avoid.

74. In this context, it seems curious to suggest, as the company does, that if a part of its motive (perhaps “the last straw”) was the complainant’s work refusal, 89(4) and/or 24(7) will be available, but if that small part is absent from the equation, the complainant has no remedy at all before the Board, regardless of how objectively unjust the situation might appear or what appears to be the plain wording of section 24(7). It seems odd to say: litigate before the Board on the 24(1) issue but if you lose go to arbitration for the rest. The argument presupposes a partition of motive and action that is unlikely to exist in reality or be so obvious to the worker whom the statute is supposed to assist. It must be remembered that in the instant case, on the pleadings there is a *prima facie* case of a breach of section 24(1), and a plausible basis for the complainant’s belief that when he was fired on August 16, his work refusal earlier that day had something to do with it. To that extent there is a reasonable and *bona fide* “safety nexus” underlying this complaint even though we have found that there has been no breach of section 24(1). It cannot be said that the complainant is obviously in the wrong forum or that his *complaint* is an abuse of process whatever we might ultimately think about the legitimacy of his work refusal on August 16. Moreover, if one looks at this problem from an organized worker’s perspective - as the statute clearly does when s/he is given a choice of forum - there is nothing incongruous in the suggestion that whatever forum is chosen,

the adjudicative process, considerations, and result should be the same, or that once the worker “gets his day in court” that should be the end of the matter.

75. Counsel for the respondent raises the spectre of the calculating complainant, contriving to obtain a “free arbitration” by asserting a breach of the OHSA. We are asked to envisage a parade of devious and disgruntled discharges, flooding the Board with frivolous safety complaints as a means of harassing their employer or obtaining an “illegitimate” review of the “justice” of their terminations. But that is not this case, it has not been the Board’s experience since 1979, and it is not at all obvious that the opportunity for abuse would actually diminish very much if the Board adopted this argument. A crafty complainant could still assert that there was at least some improper motivation, or a *bona fide* exercise of what s/he believed to be rights under safety-related legislation, and the Board would still have to entertain these representations even if, in the end, they were rejected. For example, there is not the slightest doubt that the instant case would have been litigated even if counsel’s view were the law; and as we have already noted, this case is not vexatious or launched in bad faith to harass the employer or accomplish some collateral purpose.

76. To say that the Board can or should only deal with discipline matters which turn out to be “safety related” also opens the door to the corollary: that, insofar as the matter complained of is not “safety related” or only safety-related and therefore cannot be dealt with by the Board, it must be dealt with somewhere else. This is not a novel proposition in employment law where statutory and contractual rights often overlap, and an employee’s remedies may depend upon a judgment of the employer’s “real motivation” when there are several possibilities. In *Consumers Distributing* (Board File 0999-86-U; decision of May 29, 1987) for example, an employee discharge was characterized, alternatively, as a breach of the collective agreement, an unfair labour practice, and a breach of the *Human Rights Code*, depending upon whether the employer’s action could be said to be racially motivated, anti-union, or simply high-handed and unjust. As a result, an arbitrator, a panel of the Board, and a Human Rights Board of Inquiry were all constituted to inquire into the reason for discharge - with the obvious possibility of inconsistent findings of fact and considerable cost to all parties concerned. No doubt the doctrines of *res judicata* or issue estoppel might simplify the situation before one tribunal or another if those tribunals were disposed to apply such principles, but, in our view, it was precisely this confusion and duplication which the legislature sought to avoid under the OHSA. The objective was to obtain a “final and binding” resolution of “the matter” between the parties, whether the adjudicator is the Board or an arbitrator. That is why section 24(7) is available even if there is no 24(1) breach, and that is why it is identical to section 44(9) which prescribes the remedial authority of an arbitrator.

77. Since 1979, the Board has not been inundated by complaints from wily workers asserting safety concerns in order to obtain an inexpensive review of their employer’s actions. What the Board has encountered is the unsuccessful litigant who seeks to recast his complaint as a “statutory” issue in order to obtain another hearing on a matter which has already been the subject of arbitral review under a collective agreement. For example, in *Great Atlantic & Pacific Company of Canada Limited*, [1987] OLRB Rep. May 714, an employee grieved his discharge under a collective agreement, settled that grievance by accepting reinstatement without compensation then, two months later, filed a section 24 complaint to collect the lost wages. The Board said this:

7. When a worker feels that he or she has been affected by a contravention under section 24(1) of the O.H.S.A., subsection (2) requires the worker at some point to make an election of the forum in which he or she will seek a remedy. At some point, a worker must choose either to proceed before the Board or to proceed under the arbitration provisions of the relevant collective agreement. See, *The Municipality of Metropolitan Toronto*, [1986] OLRB Rep. Feb. 283, and the cases cited therein. It is not necessary for us to define with precision at what point the worker must make an election. But having elected one forum and having obtained a determination of the issue in that forum, a worker cannot then attempt to obtain a remedy in the other

forum. Implicit in section 24(2) and the choice of procedures set out therein is the recognition of the undesirability of having the same issue litigated in two quite separate forums. We agree with the comments of the Board in *The Municipality of Metropolitan Toronto, supra*, at paragraph 10, where the Board stated that the O.H.S.A. issue raised by a grievance is not severable in the sense that one can take the just cause aspect of a discharge to arbitration and the O.H.S.A. aspect to the Board. The issue of whether the discipline was proper is one issue and with respect to that issue a worker must at some point choose in which of the two forums he or she will seek a remedy.

8. In the circumstances before us, Cullen elected to seek a remedy for his discharge by utilizing the grievance and arbitration provisions of the collective agreement between the union and the employer. Cullen's discharge grievance was settled by the union and employer with Cullen's consent. Not only did Cullen seek a remedy under the collective agreement, but a resolution of the discharge grievance was achieved which was acceptable to Cullen. In filing his O.H.S.A. complaint approximately two months after his discharge was settled, Cullen is, in effect, attempting to raise the same issue, namely the propriety of his discharge, before this Board, after agreeing to a resolution of the discharge within the process of the other available forum. The Board finds that this is an appropriate situation in which to exercise its discretion in favour of not inquiring into Cullen's complaint in Board File No. 2785-86-OH.

Similarly, in *Zalev Brothers Limited*, [1989] OLRB Rep. July 810, the Board said:

15. Counsel for the complainant asserted that "the matter" referred to in section 24(2) of the OHSA was only the "OHSA" issue while the Hinnegan award solely dealt with the "illegal strike" aspect. With respect, that approach was rejected in the *Municipality of Metropolitan Toronto, supra*, at paragraph 10, in an analysis with which this Board agrees. The "matter" is the *consequence* for the worker imposed by the employer (as set out in sections 24(1)(a) to (d)), not the reason for the consequence. It is the *reason* for the consequence which is the subject of the adjudication whether before the Board or at arbitration. If the reason is determined to be "because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations", the consequence is prohibited by the OHSA. Whether before the Board or at arbitration, the employer must articulate its "reason" for imposing the "consequence" on the worker and that reason is subject to the appropriate scrutiny.

Both cases referred to these comments in *Municipality of Metropolitan Toronto*, [1986] OLRB Rep. Feb. 283:

... The "matter" referred to in section 24(2) is the alleged violation of 24(1), namely, that an employer acted to penalize a worker, as set out in sub (a) to sub (d), because the worker complied with or sought enforcement of the OHSA. That issue of improper (or unjust) discipline is the "matter" to be heard at arbitration or before the Board. While the respondent asserts that the undisputed fact that the complainant is no longer an active employee is as a result of layoff, there is no doubt that section 24(1) of the OHSA is integral to the grievance should the grievance be adjudicated in an arbitral forum. The grievance form itself refers to "termination without just cause" rather than improper layoff or some such language. Section 24(1) affords workers a right of protection from penalties for invoking the OHSA; that right is enforceable under the legislation either at arbitration or before the Board. ...

(See also: *Scarborough General Hospital*, [1988] OLRB Rep. Sept. 981; and compare *Amalgamated Transit Union Local 113*, [1990] OLRB Rep. Dec. 1238.)

78. None of these cases is precisely on point, but they all support the suggestion that once a worker obtains an adjudication of the propriety of discipline, whether before the arbitrator or the Board, s/he cannot litigate the matter again. The Board has not accepted the proposition that the "contractual" aspects of the discharge (etc.) are severable and properly the province of the arbitrator, while the "statutory" aspects are the province of the Board. What is before the adjudicator in both cases is *the discharge, and an aggrieved worker is expected to raise all of his/her legal challenges*

to that penalty in whatever forum s/he chooses. In this regard we are attracted to the view adopted by the Court of Appeal in *Bernier v. Bernier* (1989) 62 D.L.R. 4th 561:

The doctrine of *res judicata* was stated thus by Sir James Wigram V.-C. in *Henderson v. Henderson* (1843), 3 Hare 100 at pp. 114-5, 67 E.R. 313 (Ch.):

In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

While these comments are obviously made in a different legal context, they embody sensible institutional concerns which we think should inform our interpretation of section 24(2) and 24(7). Thus, in *Amalgamated Transit Union Local 113 and Chapelle, supra*, the Board held that an unsuccessful section 24 complainant could not seek to arbitrate the “just cause” of his termination because that matter had already been dealt with or should have been dealt with under section 24(7). A complaint under 24(1) puts in issue general equitable considerations under 24(7), including any effect (in an organized context) of the “just cause clause” in a collective agreement. Once the Board has addressed 24(7) and refused to exercise its discretion, there is no “just cause” issue left to be determined.

79. In our view, when a worker elects to go to arbitration under section 24(2) he has *his whole case* considered by that arbitrator. He cannot later come to the Ontario Labour Relations Board to pursue the alleged “safety aspect” or assert some anti-safety motive which he neglected to raise or which the arbitrator may not have considered or may have rejected. He cannot claim that the arbitrator is only interpreting the agreement, leaving the statutory breach as a reserve argument to be pursued before the Board. Similarly, if a worker puts his case to the Board under section 24(2), the Board will finally resolve the matter including any application of section 24(7). There is no “contractual part” left over to be pursued at arbitration because, if relevant at all, the contractual part is a “circumstance” which could be and should be raised under 24(7). In our opinion, the OHSA contemplates not only an *election* under section 24(2) but *one adjudication* of the adverse employment consequence of which the aggrieved worker complains. To put the matter colloquially: the Board or an arbitrator will deal “with the whole ball of wax”.

80. It is important to emphasize however, that while the Board has *jurisdiction* to apply section 24(7) on any section 24(1) inquiry, it is not obliged to intervene or modify the penalty the employer has imposed. The exercise of this power is *discretionary*, and in our view, should be consistent with both the “equities” in a particular case, and the policy considerations mentioned above. Among those considerations (in the words of the Board in *Radio Shack, supra*) should be a concern that “its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible”. The words of the statute, the need for finality and the avoidance of multiple litigation all suggest that the Board’s inquiry will parallel that of an arbitrator, however, in either case, it may be significant that a complainant has acted in bad faith or launched a vexatious proceeding or otherwise abused the important rights that the OHSA was designed to protect.

81. For these reasons, we conclude that it is open to us to apply section 24(7) even though

we have found that there is no breach of section 24(1) because the discharge was not a “safety-related” reprisal. The question though, is whether this is an appropriate case to modify the complainant’s discharge and substitute some lesser penalty.

VI

82. In the instant case, the complainant has failed to establish reasonable cause for his absence from work despite being given ample opportunity to do so. Article 6.07(d) applies automatically, and, at the very least deprives him of any accumulated seniority. We see no reason to relieve the complainant of that consequence, which flows directly from the terms of the collective agreement and is entirely unrelated to his alleged safety concerns.

83. Whatever arguments might have been available to the complainant in the wake of *Re Dwyer and Chrysler Canada Limited et al*, (1978) O.R. (2d) 207, the fact is that in this collective bargaining relationship these parties have always considered the conduct mentioned in Article 6.07 to be behaviour warranting discharge. The uncontradicted evidence before us is that workers who are absent without authorization or reasonable excuse are routinely treated as having abandoned their jobs, and no one has ever questioned that proposition. In this respect, the complainant was treated in precisely the same manner as any other workers in similar circumstances. Whatever the linguistic limitations of Article 6.07, it was an established norm of *this workplace* that employees who fail to attend work without excuse put their jobs in jeopardy. That is why the company issued the warning letters that it did, and gave the complainant several opportunities to explain himself. And, we repeat, none of this had anything to do with the complainant’s alleged safety concerns or purported exercise of rights protected by the OHSA.

84. And what of the work refusal on August 16? That does not assist the complainant either, even though that was why the complainant thought he had been fired, and was his basis for filing a complaint to the Board alleging a breach of section 24(1) of the Act. But the complainant was not discharged *because* of his work refusal, and that work refusal was itself illegitimate. It is at the very least ironic that we are being asked to exercise an equitable jurisdiction in the complainant’s favour, where he was not in fact discharged contrary to section 24(1) of the OHSA, and he could not rely upon section 23, even if that had been the reason for his termination.

85. On the evidence before it, the Board is satisfied that the complainant could not and did not reasonably believe that the workplace was unsafe on August 16th. His work refusal on that day was vexatious, and was compounded by his refusal to cooperate with the Ministry of Labour team when they were investigating the very medical concerns which he now says motivated him to refuse to work in the first place. The complainant was both insubordinate and abusing the important statutory rights available to workers under section 23; and, for that reason alone (i.e. quite apart from Article 6.07) a disciplinary response would have been warranted.

86. In cases such as *Bilt-Rite*, *supra*, *Butler Metal Products*, [1988] OLRB Rep. Oct. 1003, *Ministry of Community and Social Services*, [1988] OLRB Rep. Jan. 50 and *Imperial Oil*, [1982] OLRB Rep. Apr. 580, the Board has given the OHSA a liberal interpretation to protect workers who are honestly but mistakenly trying to exercise rights under the OHSA, to comply with its obligations, or to seek its enforcement. In each of these cases, the complainant’s honesty, prudence, or good faith were mitigating factors to be considered under section 24(7), even where it turned out that the worker was being over-cautious or mistaken, and there was in fact no breach of section 24(1). The Board has accepted the maxim that “it is better to be safe than sorry”, even at the expense of some interference with an employer’s operations or prerogatives, because that approach is most consistent with the purpose of the OHSA. It follows, however, that where a worker has not acted in good faith, or has abused the important rights or remedial mechanisms

provided under the OHSA, these are factors which should weigh against him/her when the Board is asked to exercise its remedial discretion under section 24(7). That, too, is an important message to send to the employer/employee community.

87. Having considered the totality of the evidence, the Board is not persuaded that this is an appropriate case to exercise its discretion under section 24(7) of the Act. The complaint is therefore dismissed.

CONCURRING OPINION OF BOARD MEMBER G. O. SHAMANSKI; April 15, 1991

I have had the opportunity to read the opinion of the Alternate Chair, and agree with the facts as stated and found by him. I further agree with the ultimate disposition of this application; namely that it should be dismissed. However, I take issue with the observations concerning the Board's jurisdiction, and those respecting the interpretation and application of section 24(7). It seems to me that where, as in this case, the Board has determined that a worker *was not* discharged or otherwise disciplined by the employer in contravention of section 24(1), and there is no safety nexus linking the employee conduct and employer response, that should be the end of the matter, and section 24(7) can have no application. I simply do not think that the Legislature ever intended that, in a safety statute, a worker could seek or obtain a remedy for a termination which had nothing whatsoever to do with safety concerns. In my view, having made that finding, the Board's jurisdiction is exhausted.

DECISION OF BOARD MEMBER RENE R. MONTAGUE; April 15, 1991

1. Having considered the total evidence I characterize the evidence differently than the majority.

2. It is my respectful submission that the majority relies heavily on hearsay evidence of which I believe there was an excessive amount. I also believe that the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer and that burden was not met pursuant to section 24(5) of the *Occupational Health and Safety Act*.

3. It is my submission that Mr. Glen Ryerson had become a real thorn in the respondent's side. He had also at the time of his termination become a serious liability to the respondent and the incident of the work refusal of August 16, 1989 was "the straw that broke the camel's back", and was one of the *reasons* he was terminated. Mr. Ryerson fell into disrepute with the respondent beginning in February of 1987 when he insisted the union call in the Ministry of Labour inspectors regarding the isocyanate spill. This resulted in the foam line being shut down and boarded up for a period of one week until certain conditions were met. The area was also designated under the *Occupational Health and Safety Act* and Regulations as a designated exposure area for isocyanates. Further, as a result of the spill the respondent and the union agreed to participate in a isocyanate surveillance program.

4. For part of 1987 and much of 1988, eighteen months, Mr. Ryerson was off work with a knee injury. This does not score any points with the employer. In letters dated December 23, 1988 and January 6, 1989, Mr. Ryerson was able to return to work with restrictions. Now the respondent has another problem: a millwright who cannot work in all areas of its operations. The respondent then sends a letter to Mr. Ryerson dated January 11, 1989 which states in part:

...

This unfortunate news is disturbing to the respondent.

...

On January 10, 1989 Ryerson complained he had trouble breathing caused by fumes from an area of a dismantled paint pump. After a couple of hours of sitting in the boiler room he is then assigned alternate work.

5. On February 1, 1989 Ryerson was found outside by Mr. King. King asks, "What the fuck is wrong now?". Ryerson responds, "I became dizzy and felt my chest tightening up again so he had come outside for some fresh air". King responds, "If you can't do the job get the hell out!". Ryerson proceeds to Jordan's office, King's boss explaining the problem to Jordan. Jordan's response was "What do you want us to do about it?". I would like it noted that King was not called as a witness by the respondent.

6. On February 3, 1989 Ryerson is off work pursuant to doctors' notes. Doctors' notes or reports are submitted on an ongoing basis until July 1989. The respondent witnesses testified that they were not doctors and that they do not question doctors' notes. I have difficulty with the credibility of respondent witnesses on one hand stating that they were not doctors and then in July of 1989, and ongoing, questioning a number of the doctors' notes submitted by Ryerson.

7. The Board heard considerable evidence of supposed phone calls to and from a number of doctors and Ms. Bonita Clark, a worker at the Ontario Workers Health Centre, yet none of these individuals were called as witnesses by the respondent. This leads me to the conclusion that the respondent has not met its onus as per section 24(5) of the *Occupational Health and Safety Act* as it could have easily had these individuals testify, if in fact they said what the respondent witness testified they said. Many of the documents contain statements by various doctors concerning complaints, health, ability to work or possible return to work but none of those doctors gave any evidence. However the majority in reading of their decision speak a great deal about these doctors' notes, telephone conversations etc. to bolster their reasons.

8. The note given on August 17, 1989 by Dr. Reinhartz is very clear and unambiguous and should have been more than sufficient to justify the absence from July 24 to August 8, unless there was a hidden motive on behalf of the respondent to investigate further because of the work refusal.

9. On August 16, after Ryerson had refused as per the *Occupational Health and Safety Act*, the respondent terminated him the very same day. This in my opinion is what motivated the respondent to terminate Ryerson and I do hereby find that the respondent has breached section 24(1) of the *Occupational Health and Safety Act*. As a result I find that:

- (a) The complainant's work refusal was motivated by an honest belief of danger;
- (b) His fears were not groundless;
- (c) The employer should have been more sensitive to the complainant's treatment and concerns by management when he had his previous attacks in the plant.

10. I would therefore order that the complainant be reinstated in his full employment without loss of seniority. He should also be compensated for all lost wages and benefits as a result of the discharge and I would remain seized for the purpose, if the parties are not able to agree on compensation due to the complainant.

11. On the legal questions concerning the Board's jurisdiction, and those respecting the interpretation and application of section 24(7) I totally agree with the findings of Alternate Chair MacDowell.

2742-90-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Kehl Tools Ltd., Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Certain full-time employees participating in Work Sharing Program in order to avoid lay-off - Employees in Work Sharing Program working less than 24 hours per week in representative period - Union seeking one all employee bargaining unit - Employer proposing separate units for full-time and part-time employees - Board concluding that one all employee bargaining unit appropriate - Certificate issuing

BEFORE: M. A. Nairn, Vice-Chair, and Board Members R. W. Pirrie and B. L. Armstrong.

APPEARANCES: D. Flynn, H. Powers and P. Campeau for the applicant; P. F. Milloy and G. Kehl for the respondent.

DECISION OF THE BOARD; April 25, 1991

I

1. This is an application for certification. The parties met with a Labour Relations Officer prior to the date scheduled for hearing and reached agreement on certain of the matters in dispute between them. A hearing was convened before this panel to deal with outstanding issues with respect to the bargaining unit description and the list of employees.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* (the "Act").

3. The applicant applied for a bargaining unit consisting of all employees of the respondent excluding foremen, persons above the rank of foreman, and office and sales staff. The respondent employer requested that the Board find two appropriate bargaining units; one bargaining unit consisting of full-time employees and a separate corresponding part-time employee bargaining unit. In addition, the parties disagreed on whether certain individuals should be classified as "full-time" or "part-time".

4. The applicant challenged four employees on the employer's list. It is the applicant's position that Chris Young, Jim Villemaire, Ken Farough and Joe Lyons were all "full-time" employees on the date of application. It is the respondent's position that these four individuals are "part-time" employees (Joe Lyons was listed on Schedule D because he was not scheduled for and did not work on the application date. Mr. Lyons did return to work on January 18, 1991 so falls within the Board's 30/30 rule. However the question of whether he is a full-time or part-time employee remained outstanding).

5. In determining whether an employee is "full-time" or "part-time" the Board normally

looks at the employer's records of time worked in the seven weeks preceding the application date. The applicant argued that the Board should choose a different representative period in this case. The applicant further argued that these challenged individuals and the employees listed on Schedule A share a community of interest and that, in the circumstances of this case, it is appropriate that there be one bargaining unit. In other words, the applicant submits that whether or not these challenged employees are considered "part-time", all employees have a sufficient community of interest to share a single unit for collective bargaining purposes.

6. It is the position of the respondent that full-time and part-time employee bargaining units are appropriate. The respondent argued that the Board has long recognized a different community of interest between full-time and part-time employees and that there is nothing in the circumstances of this case that would warrant a departure from that recognition. In characterizing the employees, the respondent urged the Board to follow its usual approach, that is, to look at a representative seven week period immediately preceding the date of application in order to determine whether for four out of those seven weeks the employees were employed for not more than twenty-four hours per week and consequently would be considered part-time employees.

II

7. The circumstances that are relevant to this dispute can be summarized as follows. Kehl Tools Limited is an established shop that performs copy milling or machining and also gun drilling. It takes on overflow work from larger shops having contracts with the automakers in the Windsor area. The employees in the proposed bargaining unit(s) are all machinists with the exception of one maintenance person. While the hours of work fluctuate depending on the amount of available work, employees regularly work for more than twenty-four hours per week (excluding for the moment the period during the Work Sharing Program discussed later).

8. In late September or early October 1990 the respondent experienced a slow-down in work. Initially the respondent employer made efforts to find other work for its employees including maintenance and cleaning of the shop. However, the slow-down continued. On October 28, 1990, the respondent entered into a Work Sharing Agreement with Employment and Immigration Canada pursuant to which seven or eight employees (including the four challenged employees) began to participate in a work share program. In accordance with that agreement available work was shared among the employees participating in the program. The respondent paid the employees for hours actually worked and Employment and Immigration Canada subsidized the employees' wages with Unemployment Insurance benefits.

9. In reviewing the application forms that an employer must complete in order to participate in this government program, its intent is clear. As explained in the "Notes to Assist in the Preparation of a Work Sharing Agreement":

The Work Sharing Program is designed to avoid the layoff of some employees by providing a means whereby the available work is shared by all the employees. They will be working fewer hours, and receive Unemployment Insurance benefits for those days or hours that they do not work. It is a program intended to assist employers in retaining skilled employees during a period of "temporary" work shortage.

[emphasis added]

10. In order to participate, the employees affected by the Work Share Agreement must sign a declaration which reads: "In order to eliminate the proposed layoff we the undersigned employees of (name of company) hereby agree to enter into a work sharing arrangement ...". George

Kehl, the respondent's general manager acknowledged in evidence that the idea behind the work share program was to avoid a lay-off.

11. Commencing October 28, 1990 the respondent and the employees entered into the Work Sharing Agreement and employees were paid for statutory holidays and benefits in accordance with practice and the requirements of the Agreement. Hours of available work were shared between the participants in the program and as a consequence the number of hours worked by each of them was reduced. In reviewing the payroll records of the four challenged employees, it appears that this reduction was gradual.

12. Each Work Share Agreement operates for a maximum of 26 weeks. Although the program was scheduled to end on April 26, 1991, the program was terminated early on or about February 4, 1991. Employees were not satisfied with the program. Not only were their hours of work limited but the work available was unpredictable. As Mr. Kehl put it, the employees were almost working "on-call". Upon the termination of the Work Share Program three employees, Chris Young, Jim Villemaire and Joe Lyons were placed on indefinite layoff effective February 4, 1991. Ken Farough was not laid off and continues to work.

13. We are satisfied that the program contemplates that the employees who participate in the Work Sharing Program are full-time employees who are subject to a temporary reduction in the amount of available work. In addition to the notes referred to earlier, point 5 of the Work Sharing Agreement and point 7 of the Employer Eligibility Criteria provide as follows:

5. When a Work Sharing Agreement is to be terminated, the company is required to provide the following information on, or prior to, the effective date: the reasons for the termination, the future plans for Work Sharing, members, i.e., *full-time work, layoff* etc., and the effective date of the termination. This date may be the date when all members of the Unit *resumed full-time work*;

7. Retained Work Activities Significant

The establishment must still maintain a significant work activity. This means that during each week of the agreement, the hours worked by members of the Unit *must be at least 40% of what would have been their total normal hours of work (or the equivalent of two days for a normal 5 day week)*. Periodic complete plant closures (except normal vacations [sic] periods) involving the total work force are not permitted.

[emphasis added]

14. The application date in this case was January 17, 1991. Using the Board's usual four out of seven week rule in determining whether or not an employee is regularly employed for not more than twenty-four hours per week, the representative seven week period in this case would run the seven weeks from November 29, 1990 through to January 16, 1991. Applying the rule in this case, the four challenged individuals would be treated as part-time employees.

III

15. In the circumstances of this case, we would not be prepared to move from the Board's usual approach to determining who is a full-time or a part-time employee. While the "rule" is in fact only a guideline, and while the use of the representative period for determining whether someone is full-time or part-time has created and will create some anomalies, a method must exist to make the determination. We obviously favour one which developed to reflect an apparently reasonable distinction between full-time and part-time employees and is now well established, well known, and easy to apply. The parties are then able to govern themselves accordingly. (See

Sydenham District Hospital [1967] OLRB Rep. May 135 and *Trenton Memorial Hospital* [1980] OLRB Rep. Jan. 116). In particular circumstances, the Board has chosen to look at a different representative period. (See for example, *Westgate Nursing Home Inc.* [1981] OLRB Rep. Apr. 503 and *SGS Supervision Services Inc.* [1981] OLRB Rep. Oct. 1471). Such circumstances do not arise in this case. Nor are we persuaded that looking at a representative period prior to the implementation of the Work Share Program would be the appropriate approach in this case. Given our conclusion regarding the appropriate bargaining unit however, it is unnecessary to formally decide whether these four challenged individuals are full-time or part-time employees.

16. In fashioning appropriate bargaining units the Board generally accedes to a party's request to group full-time and part-time employees in separate bargaining units for collective bargaining purposes. There are two caveats to that approach. First, the Board looks to whether there is a history of employing part-time employees (see *Temspec Inc.* [1985] OLRB Rep. May 756 and compare *Board of Education for the Borough of Scarborough* [1980] OLRB Rep. Dec. 1713 with *Paris Poultry Products* [1978] OLRB Rep. May 453). It makes no sense to create a "notional" bargaining unit which has no members at the time of certification, and may never have any. However, if there is a history of part-time employment two units may be appropriate.

17. In order to show a history of employing individuals on a part-time basis, the respondent pointed to the Work Share Program which, it said, established a part-time workforce almost three months prior to the date of application for certification. But even if such a limited time period (and one resulting from a temporary program) could show a "history", we do not accept that the employer was creating a part-time workforce. It was, rather, participating in a temporary Work Share program designed to avoid the lay-off of some of its otherwise full-time employees.

18. More fundamentally, the employer's argument is based on the assumption that there is necessarily and inevitably a separate and distinct community of interest between full-time and part-time employees. As the respondent noted, the Board has generally accepted that such a distinction can be made. (See *Board of Education for the Borough of Scarborough*, *supra*, and cases cited therein). It is probably also the case that a party challenging that assumption must provide evidence to show the Board that the full-time and part-time employees share a community of interest so as to include them in the same bargaining unit.

19. However, in the circumstances of this case, the four challenged employees more than resemble the full-time employees. The difference between them is the fact of their participation in the Work Share Program. We note that there were at least seven individuals participating in the program. We can only assume that the other employees in the program had sufficient work to maintain their average hours in excess of 24 hours per week.

20. Until their participation in the Work Share Program these employees were working in excess of twenty-four hours per week. There is no evidence of any other employment of part-time employees. The employees in dispute were not historically "part-timers", nor is there anything unique about a temporary part-time status that is not fully explained by the government program in which they participated for a time (and which, even as of the date of the hearing, was over).

21. In our view, the circumstances and considerations in this case resemble those in *Paris Poultry Products*, *supra*. We are satisfied that the evidence in this case supports the conclusion that an all employee bargaining unit is an appropriate bargaining unit.

22. Having regard to the above, we find that all employees of the respondent in the Township of Sandwich West save and except foremen and persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

23. Having regard to our finding with respect to the bargaining unit and the conclusions with respect to the list of employees, we are satisfied that there were thirteen employees in the bargaining unit at the time the application was made.

24. In support of its application for certification the applicant trade union filed valid documentary evidence of membership on behalf of eight individuals, all of which coincide with names of employees in the bargaining unit. A duly completed Form 9 was also filed. A document was also filed by employees opposing the certification application. There is no overlap between the names of employees expressing opposition to the application and the names of employees who have signed membership cards in the trade union. Therefore no doubt is cast on the membership evidence filed by the applicant and there is no need to inquire into the voluntariness of the document filed.

25. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 4, 1991, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(g) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

26. A certificate will issue to the applicant.

1171-89-FC; 1545-89-R The United Food & Commercial Workers Union, Local 206, Applicant v. **Knob Hill Farms Limited**, Respondent; Susan Caterina, Applicant v. The United Food & Commercial Workers Union Local 206, Respondent v. Knob Hill Farms Limited, Intervener

First Contract Arbitration - Termination - Employer initially refusing to meet to bargain, subsequently attempting to delay commencement of bargaining, and refusing to provide union with accurate collective bargaining information to which it was entitled - Employer engaging in surface bargaining - Employer positions with respect to management rights, wages, benefits and classifications uncompromising and without reasonable justification - First contract arbitration directed - Board exercising discretion under section 40a(22) of the Act to dismiss termination application

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members J. A. Ronson and K. Davies.

APPEARANCES: Joanne L. McMahon, Ronald Springall and Michael Duden for the applicant; Michael Gordon and Howard Wood for the respondent.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR AND BOARD MEMBER K. DAVIES:
April 9, 1991

I The Applications

1. Board File No. 1171-89-FC is an application, under section 40a of the *Labour Relations Act*, for a direction that a first collective agreement between the United Food & Commercial Workers Union, Local 206 ("Local 206") and Knob Hill Farms Limited ("Knob Hill") be settled by arbitration. The circumstances surrounding this application are far from typical. We note that

partly because of that, and partly because the parties apparently found it to be in their interests to accommodate each other in the course of the proceeding, this matter did not progress with the usual speed of such an application.

2. This first contract application was first filed on August 4, 1989 and first came on for hearing on August 16 and 17, 1989. At that time, Knob Hill moved to have the Board dismiss the application because the name used by the applicant to describe itself on it did not describe any entity which holds bargaining rights for any of its employees. In the alternative, Knob Hill moved that the Board dismiss the application as premature, or adjourn it pending the disposition of reconsideration requests by, among others, both Knob Hill and Local 206, and a request for a representation vote by a Group of Employees with respect to the certification of the trade union. In an oral decision delivered on August 17, 1989 (subsequently reduced to writing and reported at [1989] OLRB Rep. Aug. 852) the Board (differently constituted in part - the "first Surdykowski panel") dismissed Knob Hill's first motion and amended the applicant's name to match the one which appears on the certificate issued by the Board. The Board also dismissed Knob Hill's motion to dismiss the application but did find it appropriate to adjourn the application pending the disposition of the requests for reconsideration and the request by the group of objecting employees in Board File Nos. 0542-86-R and 0035-86-U (the certification application and a related complaint under section 89 of the Act).

3. Board File No. 1545-89-R is an application, under section 57 of the *Labour Relations Act*, for a declaration terminating Local 206's bargaining rights for the bargaining unit affected by the first contract application herein. It was filed on September 22, 1989 and came on for hearing before the Board, again differently constituted (the "Nairn panel"), on October 24, 1989. Upon hearing the representations of the parties, the Nairn panel adjourned the termination application to be scheduled to be heard together with the first contract application.

4. In the result, both applications herein were left to await the disposition of the reconsideration requests made by, among others, Local 206 and Knob Hill. By (majority) decision dated January 3, 1990 (reported at [1990] OLRB Rep. Feb. 169) the panel of the Board which had certified Local 206 (the "Petryshen panel") dismissed Knob Hill's request for reconsideration. Upon Knob Hill's request for reconsideration being dismissed, the remaining requests for reconsideration, including Local 206's, were withdrawn with leave of the Board. The (majority of the) Petryshen panel also found that no effect could be given to the "petition" of the objecting employees.

5. Subsequently, the first contract application and the termination application were brought on for hearing before this panel beginning on February 16, 1990.

II Which Application Should be Considered First

6. At the outset of the hearing, the termination applicant (Susan Caterina), supported by Knob Hill, asked that the Board consider her application first. Local 206 submitted that the Board should deal with its first contract application first.

7. Section 40a(22) of the Act provides that:

(22) Notwithstanding subsection (2), where an application under subsection (1) has been filed with the Board and a final decision on the application has not been issued by it and there has also been filed with the Board, either or both,

- (a) an application for a declaration that the trade union no longer represents the employees in the bargaining unit; and

- (b) an application for certification by another trade union as bargaining agent for employees in the bargaining unit,

the Board shall consider the applications in the order that it considers appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered.

Although this is not the first time that an issue has arisen with respect to the application of section 40a(22), the jurisprudence provides us with little guidance in the unusual circumstances before the Board in this proceeding.

8. In *Egan Visual Inc.*, [1986] OLRB Rep. Aug. 1071, the Board considered a situation in which a trade union had been certified on February 18, 1985, a termination application had been filed on April 4, 1986 and was scheduled to be heard on July 7, 1986, section 40a of the Act had come into force on May 26, 1986, and the trade union therein had filed its application for a direction under section 40a on July 3, 1986. In concluding that the termination and the first contact applications should proceed together in order to enable the Board to properly determine which one it should consider first, the Board observed that the order in which the applications were filed was a relevant but not determinative factor. It also recognized that the wisdom or usefulness of directing that a first contract be settled by arbitration was open to question in circumstances where the employees affected no longer support the trade union concerned. On the other hand, observed the Board, if the trade union's support had been eroded as a result of the employer's actions in bargaining (or perhaps otherwise, we suggest), then an arbitrated first collective agreement may well be appropriate. As it turned out, the parties resolved the matters in dispute between them for themselves and the Board was not called on to make a determination under section 40a(22) or to comment further on it in that proceeding.

9. In *Mansour Rockbolting Limited*, [1986] OLRB Rep. Oct. 1346, the Board had before it a section 89 complaint by the trade union on November 19, 1985, a termination application filed on July 17, 1986, a second section 89 complaint filed by the trade union on August 14, 1986, and a first contract application filed by the trade union on August 18, 1986. It appears that the Board considered the termination application, which it dismissed, first, it gave no reasons for doing so. Because it is not apparent why the Board found it appropriate to consider the termination application first, that decision is of little assistance to us.

10. The Board decisions dealing with situations in which a termination application was filed when a first contract proceeding had been virtually or entirely completed were also of little assistance to us because of the nature of the considerations apposite in those circumstances (see, for example, *Venture Industries Canada, Ltd.*, [1990] OLRB Rep. May 625, *Northfield Metal Products Ltd.*, [1990] OLRB Rep. Mar. 302, *Co-Fo Forming Construction Limited*, [1987] OLRB Rep. June 828).

11. Upon hearing the representations of the parties with respect to how it should proceed with these two applications, the Board unanimously ruled (orally) that it would hear them together and then make the requisite determination under section 40a(22). The Board was satisfied that that determination could not be made in this case in the absence of the evidence and representation of the parties with respect to applications.

III The Direction that a First Collective Agreement Be Settled by Arbitration

12. Section 40a(1) and (2) of the *Labour Relations Act* provide that:

- (1) Where the parties are unable to effect a first collective agreement and the Minister has

released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

Since *Nepean Roof Trust Limited*, [1986] OLRB Rep. July 1005, the seminal decision dealing with the first contract provisions in the Act, the Board has consistently acknowledged that section 40a is remedial legislation which should be liberally construed, but also that it is not intended to supplant the primacy of free collective bargaining or to provide automatic access to arbitration in all cases where the parties are unable to negotiate a first collective agreement. The provisions of section 40a are a statutory recognition of the importance of and difficulties which may be encountered in situations where a first collective agreement is being negotiated. Since there would be no application under section 40a if a first collective agreement was achieved, the mere lack of one does not, by itself, mean that the process of collective bargaining has been unsuccessful or, even if it has been unsuccessful, that is appropriate that a first collective agreement between the parties be settled by arbitration. Further, as the Board's decisions in *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441 and *Juvenile Detention (Niagara) Inc.*, [1987] OLRB Rep. Jan. 66 illustrate, an application under section 40a may be premature. However, and as the Board's jurisprudence also amply illustrates, there is no absolute minimum point prior to which an application cannot be successfully made. What the minimum point is in any given case will depend on the circumstances of that case.

13. As its preamble suggests, the *Labour Relations Act* is designed to encourage collective bargaining between employers and trade unions representing their employees. The Act contemplates that the certification (or voluntary recognition) of a trade union will initiate a collective bargaining process which will lead to a collective agreement between the employer and the trade union, which regulates the terms and conditions of employment of the bargaining unit employees. On occasion, the process does not result in a collective agreement. The Act does not require that an employer be happy that its employees are represented by a trade union. Nor does it guarantee that a collective agreement will ultimately be achieved after a successful application for certification. However, the Act does require an employer to bargain in good faith and make every reasonable effort to make a collective agreement with a trade union which has been certified as the exclusive bargaining agent for its employees. Section 40a is intended to provide a remedy where the process of collective bargaining in a first collective agreement situation has been unsuccessful for any of the reasons set out in it.

IV Summary of Events Leading to These Applications

14. The history of the applications herein is both lengthy and complex. That history may be

traced through the several Board decisions which detail various portions of it. We find it unnecessary to review that history in detail. For our purposes a brief summary will suffice.

15. Local 206 began an organizing campaign of employees of Knob Hill in March 1986. Local 206 applied for certification on May 23, 1986. By decision dated December 22, 1987 (reported at [1987] OLRB Rep. Dec. 1531), Local 206 was certified as the exclusive bargaining agent for all employees of Knob Hill at Oshawa, Ontario, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager and office staff pursuant to section 8 of the Act which provides that:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

16. Knob Hill immediately (by letter dated January 4, 1988) sought reconsideration of that decision. This was dismissed by decision dated March 2, 1988. The Group of Employees, Objectors which had participated in the certification proceedings sought judicial review of the Board's decision in an application filed on March 25, 1988. Knob Hill filed its own application for judicial review on March 29, 1988. Knob Hill also sought a stay of the Board's decision pending the disposition of its application for judicial review. Its application for a stay was dismissed by the Divisional Court on May 30, 1988.

17. In the meantime, Local 206, by letter dated January 15, 1988, had given Knob Hill notice of its desire to commence collective bargaining, as it was entitled (and indeed, *required*) to do by section 14 of the Act. By letter dated January 28, 1988, the respondent acknowledged receipt of Local 206's notice to bargain and advised that:

As you are aware, the Ontario Labour Relations Board has been requested to reconsider its decision of the 22nd day of December, 1987. The reconsideration is the first step in the review process of this decision.

18. By letter dated April 13, 1988, counsel for Knob Hill asked that Local 206 provide its available days for bargaining and a copy of its proposed collective agreement. In response, an individual who, although employed by Local 175 of the United Food & Commercial Workers International Union, had been designated to assist Local 206 in its bargaining with Knob Hill, suggested twelve dates between April 28 and May 13, 1988. Counsel for the respondent replied that he was not available at all until May 31 or June 1, 1988. It is hardly surprising that the Union was not satisfied with this response and promptly (on or about April 26, 1988) applied for conciliation. What is surprising is that the application was made in the name of "United Food & Commercial Workers International Union, Local 175 (formerly Local 206)" ("Local 175"). Knob Hill objected to the application for conciliation on the basis that it was premature. It was not until mid-May, 1988 that, to borrow the expression of Howard Wood (Knob Hill's general counsel and its sole witness in this proceeding), "the light went on" and Knob Hill realized that it was Local 175, not Local 206, which had applied for conciliation. Knob Hill seized upon this as a further basis for objecting to the appointment of a conciliation officer.

19. Although we have the undoubted benefit of hindsight, it is difficult to understand why the Union began to and subsequently persisted in taking the position that Local 175 held the bargaining rights which Local 206 had obtained, particularly when, to this day, Local 206 itself takes

the position that the merger between itself and Local 175 has not been completed. Doing so did nothing to further collective bargaining. Instead, it led to further litigation which did much to delay both the collective bargaining between the parties and the first contract application herein.

20. In any event, pursuant to section 107 of the Act, the Minister (to whom an application for conciliation is made pursuant to section 16 of the Act) found it appropriate to seek the advice of the Board with respect to Knob Hill's challenge to his authority to appoint a conciliation officer as requested by Local 175.

21. By decision dated July 28, 1988, the Board (the "Knopf panel") adjourned the section 107 referral so that the proper materials could be filed and proper notice given to the employees in the bargaining unit of Local 175's request therein that the Board declare that a merger had occurred between Local 206 and Local 175. Subsequently, Ron Springall, who was then and is now the sole officer of Local 206, filed a reply confirming that such a merger had taken place notwithstanding that, as he testified in this proceeding, he did not then and does not now believe that such a merger had or has in fact effectively occurred. Knob Hill, and the Group of Employees which had objected to and participated in certification proceeding opposed Local 175's application in that respect.

22. By decision dated August 18, 1988 (by the "first Gray panel") and reported [1988] OLRB Rep. Aug. 810, the Board concluded that Local 175 could not be a successor trade union within the meaning of sections 62 or 107(2) of the Act, and that Local 175 held no bargaining rights with respect to employees of Knob Hill and was not a "party within the meaning of section 16". The Board therefore advised the Minister that he did not have the authority to appoint a conciliation officer at the request of Local 175. The Minister accepted this advice and declined to appoint a conciliation officer.

23. Local 206 then itself sought the appointment of a conciliation officer. It chose also to seek reconsideration of the certification decision, asking that Local 175 be substituted on the certificate issued to Local 206, albeit without prejudice to its request for conciliation. This strategy led directly to further delays in the collective bargaining between the parties as demonstrated by the decision of the first Surdykowski panel. The International Union and Local 175 sought to intervene in Local 206's request, seeking the same relief. Knob Hill opposed Local 206's application for conciliation on the basis that it was premature, and on the basis that Local 206 no longer existed. The Minister again found it appropriate to refer the question of his authority to appoint a conciliation officer as requested by Local 206 to the Board for its advice. By majority decision dated November 8, 1988 (written reasons written on February 9, 1989 and reported at [1989] OLRB Rep. Feb. 149) the Board (the "second Gray panel") advised the Minister that he did have the authority to appoint a conciliation officer at the request of Local 206. The Minister again accepted the Board's advice and, by letter dated November 17, 1988, appointed a conciliation officer. By letter dated November 14, 1988, Knob Hill again sought reconsideration of the original certification decision, essentially on the basis that Local 206 and its counsel had violated section 58 of the Act by reason of their failure to make proper and timely disclosure of the merger agreement and proposed merger between Locals 206 and 175. Knob Hill took the position that this constituted a fraud on the Board within the meaning of section 58 and that the Board should therefore void the certificate which it had issued to Local 206. Also, by letter dated December 12, 1988, a Group of Employees, delivered another "petition" to the Board and to the Minister seeking a representation vote. This could also be characterized as being in the nature of a request for reconsideration of the original certification decision.

24. It took some time for the various requests for reconsideration to come on for a hearing.

It would not be useful to recount the delays or the reasons for them. Suffice to say that while no one participant was responsible for all of the delays, Local 206 requested and obtained several adjournments which delayed the hearing.

25. In the meantime, Knob Hill and Local 206 had, at long last, begun actual collective bargaining, nearly a year after Local 206 had delivered its notice to bargain. Local 206 tabled its first collective bargaining proposal on December 21, 1988. Knob Hill tabled its first proposal on January 11, 1989. Then, on January 18, 1989, Knob Hill took the position that it would not release wage and benefit information with respect to bargaining unit employees or bargain monetary issues until the Group of Employees received a response to their "petition" from the Minister.

26. Notwithstanding that, Local 206 tabled a second collective bargaining proposal on February 1, 1990. Knob Hill tabled its second proposal on February 9, 1990 and February 16, 1989. Local 206 tabled a third proposal on February 16, 1989 and Knob Hill tabled its third proposal on February 23, 1989.

27. Local 206 also filed a complaint under section 89 of the Act alleging that Knob Hill had contravened section 15 by failing to provide the information it had requested. That matter was resolved between the parties and, by decision dated May 1, 1989 (by the "MacDowell panel") the Board issued a "consent order and direction" as follows:

The Board directs that the respondent Knob Hill Farms Limited provide Local 206 of the United Food and Commercial Workers Union with a recapitulation of the wage rates payable to employees in the bargaining unit as at the week ending December 18, 1988 at Knob Hill Farms in Oshawa, Ontario, no later than 5:00 p.m. Tuesday, May 16, 1989. Delivery by facsimile machine to Local 206 at #519-744-8357 will be sufficient compliance with this Order. Upon compliance with the Order, the complainant will withdraw the instant complaint.

This Board order reflects the information which was requested prior to and in the section 89 complaint and Knob Hill's agreement to provide the wage rate information which had been requested. Knob Hill did indeed comply with the Board order. What it failed to do, however, was to disclose to either Local 206 or to the Board that it had in the interim implemented a wage increase which affected the bargaining unit employees and that the information it had agreed to provide was therefore inaccurate for collective bargaining purposes. Further, as the evidence before the Board in this proceeding revealed, the information provided by Knob Hill did not accurately reflect the wages being paid to bargaining unit employees in any event.

28. Local 206 tabled a further proposal on April 10, 1988. Knob Hill responded by letter dated May 16, 1989 with a written summary of the parties' respective positions in bargaining including Knob Hill's position as at that date.

29. The applications for judicial review (see paragraph 16, above) were dismissed by the Divisional Court on June 9, 1989 (leave to appeal those decisions was dismissed by the Court of Appeal on October 22, 1990). The union tabled a further proposal on June 19, 1989 and sought a "no-board report" on that day as well. Over the objection of Knob Hill, the Minister released a notice to the parties that he did not consider it advisable to appoint a conciliation board on July 28, 1989.

30. The first contract application herein was filed on August 4, 1989. By oral decision given at a hearing on August 17, 1989 (written decision issued August 21, 1989 and reported at [1989] OLRB Rep. Aug. 852), the Board adjourned the first contract application pending the disposition of the requests for reconsideration of the certification decision (see paragraph 2, above).

31. The application for termination was then made on September 27, 1989 (see paragraph 3, above).

32. The requests for reconsideration were heard on November 2 and 3, 1989. By decision dated January 31, 1990 (reported at [1990] OLRB Rep. Feb. 169), Knob Hill's request for reconsideration and its complaint that Local 206 and its counsel had violated section 58 of the Act were dismissed by the Petryshen panel. The Petryshen panel also determined that no effect could be given to the December 1988 "petition". The various unions' requests for reconsideration were withdrawn with leave of the Board (see paragraph 4, above).

33. Pursuant to the first Surdykowski panel's decision in the first contract application and the Nairn panel's decision in the termination application the two applications herein came on for hearing together beginning February 16, 1990 and continuing on twelve further dates.

V The Decision

34. We start then with a situation in which Local 206 was certified as the exclusive bargaining agent for certain of Knob Hill's employees in Oshawa, pursuant to the extraordinary provisions of section 8 of the Act, as a result of breaches of the *Labour Relations Act* by Knob Hill which made it unlikely that the true wishes of the employees could be ascertained. In the course of its decision in that respect, the majority of the Petryshen panel addressed an argument advanced by Knob Hill the use of section 8 in the context of legislation which includes first contact arbitration provisions as follows:

57. Counsel for the Employer submitted that the approach the Board has adopted in section 8 cases should be reconsidered as a result of the amendment to the Act providing for first contract arbitration. Counsel suggested that section 8 conflicts with the generally accepted majoritarian [sic] principle. Prior to the recent first contract amendment, the true test of whether a union had sufficient support to engage in bargaining occurred at the bargaining table. If the bargaining unit employees were not in favour of the union or its bargaining stance, a union would likely not be able to conclude a collective agreement. Since the first contract provisions of the Act provide for a situation where the union may get a first collective agreement (even though support for the union is very low) from bargaining unit employees, it was submitted that the Board should lean towards the majoritarian [sic] principle in its application of section 8.

58. We reject the suggestion that the recent first contract legislation provides a basis for altering the way in which the Board interprets and applies section 8 of the Act. As noted earlier, the purpose of section 8 is to provide a remedy for trade unions where illegal employer activity has destroyed the ability of employees to choose freely. *In part, the first contract provisions represent another remedy to assist trade unions and employees in their initial efforts at collective bargaining in situations where the failure of the union to gain or maintain support from employees is attributable to illegal or other undesirable conduct on the part of an employer.* The certification stage and the first collective agreement stage represent the first two steps in a continuing process, and the section 8 and the first contract remedies are two distinct legislative responses designed to promote collective bargaining. An approach by the Board which leaned towards the majoritarian principle would limit the availability of a section 8 remedy, a remedy which attempts to address situations where the Union has not succeeded in receiving majority support because of an employer's illegal conduct. In our view, such a result was not intended by the Legislature when it enacted the first contract provisions. A greater emphasis on the majoritarian principle would be inconsistent with the purpose of section 8 which addresses circumstances where the true wishes of employees (the majority view) are not likely to be ascertained. In addition, Counsel's argument appears to suggest that access to an arbitrated first collective agreement is automatic. This, of course, is not the case. Since there can be no direction to settle the first collective agreement by arbitration unless it can be demonstrated that bargaining has been unsuccessful because of one or more of the reasons set out in section 40a(2), it is clear that a certificate does not automatically entitle a union to an arbitrated collective agreement under the *Labour Relations Act*.

It is difficult to appreciate why the existence of the first contract remedy should affect the way in which section 8 is interpreted and applied when its availability is anything but certain.

[emphasis added]

And, as the Board suggested in *Zenith Wood Turners Inc.*, [1987] OLRB Rep. Nov. 1443, section 40a may provide an appropriate remedy in circumstances where the effects of unfair labour practices committed during an organizing campaign extend to the process of collective bargaining which follows certification.

35. Knob Hill reacted to the certification decision by immediately applying for reconsideration and, subsequently, for judicial review. In addition, Knob Hill failed to implement the Petryshen panel's direction that it reinstate fourteen employees which it had improperly terminated. The Petryshen panel's March 23, 1988 decision in that respect reveals that Local 206 had complained to the Board of Knob Hill's failure in that respect by letter dated January 27, 1988. The Petryshen panel was satisfied that Knob Hill had failed to comply with the Board's direction as alleged by Local 206 (including the Board's direction that the company post certain specified notices to employees) and directed that a copy of the directions in that respect be filed with the Supreme Court of Ontario pursuant to section 89(6) of the Act. Still Knob Hill did not comply. Instead, by letter dated April 13, 1988, Knob Hill sought "clarification" of the Board's directions. Before receiving a response, Knob Hill sent out recall notices, dated May 12, 1988, to the fourteen employees, some four and a half months after being directed to do so, and more than two months after its request for reconsideration had been dismissed. Even then, ten of the fourteen employees were instructed to report for work on May 30, 1988 and the remaining four were advised that they had been reinstated in employment but laid off. Knob Hill offered no satisfactory explanation for its dilatory conduct, either in seeking "clarification" earlier or for its failure to reinstate and recall earlier the employees in the manner it did in May, 1988.

36. Knob Hill was also slow to come to the bargaining table. Knob Hill's response to Local 206's notice to bargain was wholly inadequate and inappropriate. In effect, it was a refusal to bargain as required by section 15 of the Act and a refusal to recognize Local 206's bargaining authority (s.40a(2)(a)). This, together with its response to the dates for bargaining subsequently suggested by Local 206, its response to Local 206's request for collective bargaining information (including wages and benefits) in respect of bargaining unit employees, and its general approach to bargaining (including its insistence that some items be settled before others were bargained) all demonstrate that it was less than anxious to conclude a collective agreement with Local 206 and constitute a failure to make reasonable and expeditious efforts to conclude a collective agreement (s.40a(2)(c)).

37. Knob Hill's response to the section 89 complaint filed by Local 206 as a result of the company's failure to provide the collective bargaining information requested is also telling. First, it waited until the very last possible moment to settle the complaint in a way which constituted a complete capitulation. Then, although it provided the information it had agreed to provide, it failed to reveal that it had implemented a wage increase in the interim and that the information it was providing was therefore inaccurate. Indeed, up to and including the hearing of these applications, Knob Hill has failed to provide accurate information in that respect. This too constituted a failure by Knob Hill to make reasonable or expeditious efforts to conclude a collective agreement (s.40a(2)(c)).

38. Once at the bargaining table, Knob Hill's conduct did nothing to further collective bargaining between the parties. On the contrary, Knob Hill attempted to deflect the focus of the real matters as in issue between the parties and made proposals calculated to evoke a negative response and to extend the bargaining. For example, one of Knob Hill's proposals (subsequently dropped)

purported to dictate what use could be made use of union dues, a purely internal trade union matter. Knob Hill also insisted, and has, to a great extent, continued to insist, that things remain as they were prior to certification. This is illustrated by, for example, Knob Hill's management rights, wages, benefits, and job classifications proposals. As indicated above, Knob Hill also insisted that it would not negotiate any monetary items until all non-monetary issues were resolved. Despite Knob Hill's assertion to the contrary, it is evident that Local 206 did not agree to this procedure. On the contrary, the evidence reveals that Local 206 repeatedly sought wage and benefit information and sought to bargain monetary items. Indeed, it had some, albeit limited, success in that respect. That success served to reveal both Knob Hill's refusal to focus on monetary matters and its position in that respect. For example, Knob Hill insisted throughout that if its unionized employees (that is, those represented by Local 206) received a wage increase, either in the exercise of Knob Hill's discretion (which it insisted it should continue to have) or through collective bargaining, its non-unionized employees will receive the same wage increase, and vice-versa. In a similar vein, Knob Hill has insisted that, to accommodate that position, the *status quo* on wages is to be maintained. Knob Hill failed to provide any justification (reasonable or otherwise) for that position. Further, Knob Hill insisted and continues to insist that it should have final unilateral right to establish not only new bargaining unit positions but also the job duties and wage rates for such new positions. Knob Hill also insists on the right to unilaterally change existing job duties and, it appears, the wage rates associated with a position when its job duties are changed. Knob Hill offered no adequate explanation for that position either.

39. With respect to benefits other than vacation, Knob Hill also insists on the *status quo*, again without adequate explanation. With respect to vacations, Knob Hill steadfastly maintains that bargaining unit employees should only be entitled to the bare minimum provided for in that respect by the *Employment Standards Act*, even though it could not say that there aren't bargaining unit employees who presently receive a greater vacation benefit than that. Knob Hill's position in this respect too has been uncompromising without reasonable justification (s.40a(2)(b)).

40. Knob Hill has also refused to bargain with Local 206 with respect to the payments which it has historically made to employees at or about the end of each calendar year. It maintains that these are not "bonuses", as Local 206 sometimes refers to them, but rather *ex gratia* payments which are not part of the bargaining unit employees present "contract of employment". Knob Hill has taken the position that whether and in what amounts it continues to make such payments is a matter which is for it alone to determine, and that it is not required to either discuss these payments with Local 206, or to provide Local 206 with any information regarding them. This amounts to a refusal to recognize Local 206's bargaining authority (s.40a(2)(a)).

41. There is a very fine line between hard bargaining (which is lawful), and surface or otherwise improper bargaining (which is not lawful - see, for example *The Daily Times*, [1978] OLRB Rep. July 604, *Radio Shack*, [1979] OLRB Rep. Dec. 1220; application for judicial review dismissed 80 CLLC 26 14,017 (Ont. Div. Ct.); application for leave to appeal to the Court of Appeal dismissed March 10, 1980; *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397). Knob Hill engaged in surface bargaining. Its conduct clearly demonstrates an unwillingness to accept that Local 206 has been certified as the exclusive bargaining agent for certain of its employees in Oshawa, or to bargain a collective agreement with Local 206. It has pursued every possible avenue, both legitimate and otherwise, to defeat, or at least delay for as long as possible, the enforcement of those bargaining rights. It has sought reconsideration and judicial review as it is entitled to do. Its conduct in bargaining, or rather its failure to conduct itself properly in bargaining, is another matter, however.

42. Knob Hill's refusal to bargain after Local 206 had delivered its notice to bargain was

improper. The fact that a request for reconsideration or an application for a judicial review has been made does not stay either the effect of a Board decision (which Knob Hill's application to the Divisional Court for a stay demonstrated it was well aware of) or the obligation to bargain in good faith and make reasonable effort to make a collective agreement as required by section 15 of the Act. We recognize that, as a practical matter, parties will sometimes mutually agree to suspend bargaining pending the disposition of an application for judicial review. Whatever the propriety of such an agreement, there was no such mutual agreement between Knob Hill and Local 206 in this case, notwithstanding Local 206's inaction in response to Knob Hill's refusal to bargain. No party has a right to refuse to bargain because of a reconsideration request or an application for judicial review is pending (see, for example, *Cabletech Wire Co. Ltd.*, [1978] OLRB Rep. Oct. 895, 4-B *Manufacturing Ltd.*, [1978] OLRB Rep. Aug. 741). Knob Hill's position constituted an improper refusal to recognize Local 206's bargaining authority (s.40a(2)(a)).

43. Further, we recognize that it is not uncommon for parties to agree to bargain with respect to certain matters or classes of matters before moving on to discussing other issues. There is nothing wrong with doing that in order to give some structure to the negotiations. In the absence of such an agreement, however, one party is not entitled to insist on discussing particular items or classes of items to the exclusion of others or to refuse to bargain certain matters until one or more other matters have been settled (see, for example, *The Journal Publishing Co. of Ottawa Ltd.*, [1977] OLRB Rep. June 309, *Rolph-Clark-Stone Packaging*, [1980] OLRB Rep. July 1045). *In the circumstances of this case*, as recounted above, we are satisfied that non-monetary items be bargained to the exclusion of monetary items constituted a failure to make reasonable or expeditious efforts to conclude a collective agreement (s.40a(2)(c)).

44. Even before the introduction of the first contract arbitration provisions in section 40a, it had long been recognized that negotiations for a first collective agreement must be pursued with reasonable diligence. Such reasonable diligence requires that parties make themselves available to bargain (see, for example, *Fotomat Canada Ltd.*, *supra*). Knob Hill's response to Local 206's notice to bargain, the dates for bargaining subsequently suggested by Local 206, to Local 206's request for collective bargaining information, and its general approach to bargaining demonstrates that Knob Hill was less than reasonably diligent in its approach to collective bargaining. The manner in which Knob Hill responded to Local 206's requests for information, both before and after the section 89 complaint filed by Local 206 in that respect was also completely improper and served to substantially delay and sidetrack collective bargaining. It has long been established that a trade union is entitled to such information for collective bargaining purposes (*DeVilbiss (Canada) Ltd.*, [1976] OLRB Rep. Mar. 49, *Globe Spring and Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303, *The Windsor Star*, [1983] OLRB Rep. Dec. 2147, *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)*, [1985] OLRB Rep. May 705, *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453, *Ford Glass Limited*, [1986] OLRB Rep. May 624, among others). Further, as the Board noted in *Forintek Canada Corp.*, *supra*:

...

33. A belief that some number of bargaining unit employees did not wish the requested information disclosed to the union is no answer to a complaint that the failure to disclose it violates section 15 of the Act, any more than a belief that some number of employees did not wish the union to represent them would justify a refusal to bargain with a union which is entitled by law to act as exclusive bargaining agent for a bargaining unit which included those employees. The union's right to and need for the requested information were and are concomitants of the rights and obligations which flow from its status as exclusive bargaining agent, a status which continues until its bargaining rights are abandoned by the trade union or terminated by vote of a majority of employees in the bargaining unit. Although the union has not made a separate complaint about the past survey on which the employer relied during bargaining when it refused to provide

requested information, we are bound to observe that it is quite inconsistent with recognition of a trade union as exclusive bargaining agent of all employees in a bargaining unit for the employer to have asked those employees individually (or collectively) whether they approved of the employer's giving information about their salaries to their bargaining agent. The respondent's demand for individual written authorizations was equally inconsistent with its obligation to recognize the union as exclusive bargaining agent, and neither the union's delay in providing nor its attempts to obtain such authorizations can in any way excuse the respondents' conduct. The fact that Forintek had refused to provide requested particulars of existing terms and conditions of employment during the bargaining which led to previous collective agreements without its refusal then becoming the subject matter of an unfair labour practice complaint is no answer to this complaint that its refusal to do so during these negotiations violated section 15 of the Act.

There was no legitimate basis for Knob Hill's refusal to provide the requested information to Local 206. Further, even though Knob Hill acted in accordance with the letter of the settlement and Board order with respect to the section 89 complaint its failure to provide accurate information to Local 206, either pursuant to that settlement and Board order or otherwise, is the very antithesis of good faith bargaining and constituted a failure to make reasonable or expeditious efforts to conclude a collective agreement (s.40a(2)(c)).

45. Some of the delay in bargaining, particularly that period between May, 1988 and August 18, 1988, arose out of the union's identity confusion. In that respect, there is merit to Knob Hill's explanation that it was concerned about whether it should be bargaining with Local 206 or Local 175 (since an employer is prohibited from bargaining or entering into a collective agreement with any trade union other than the one which holds the bargaining rights for its employees - section 67 of the Act). Knob Hill properly took the position that it could not bargain with Local 175. Local 206 argued that however legitimate the company's concern was, Knob Hill made no effort to contact anyone from either Local 206 or Local 175 with respect to its concern. It is curious that Knob Hill did not identify its concern until some two and a half months after it began to correspond with Local 175 with respect to collective bargaining. However, judging by the conduct of the unions in persisting in their assertion that there had been a merger between Locals 206 and 175 such that Local 175 held the bargaining rights for Knob Hill employees which Local 206 had been granted even after Knob Hill questioned Local 175's status as a collective bargaining representative, it is unlikely that these concerns would have been alleviated as a result of any such enquiries. However, taken in context, Knob Hill's response to this situation does shed some light on its motives and intentions in collective bargaining. We find it significant that Knob Hill dragged its feet in responding to Local 175's request for information to which a collective bargaining representative is clearly entitled before it recognized or raised any question of Local 175's status to make such a request or to receive such information. We are satisfied that no small part of Knob Hill's motive was its desire to delay or entirely stop collective bargaining.

46. To the extent that Knob Hill suggests that Local 206's conduct with respect to the purported merger with Local 175 constituted a fraud or was otherwise improper, its allegations have been disposed of by the Board in other proceedings. In our view, they are irrelevant to the Board's considerations in this proceeding except insofar as they complete the background against which the applications herein were brought. Whatever criticisms may be made of Local 206's conduct, the fact remains that it has, at all material times, held the bargaining rights granted to it by the Board on December 22, 1987, and there is nothing which could reasonably have led Knob Hill to think otherwise. To the extent that Local 206's conduct has resulted in delays in either the collective bargaining process or its first contract application herein, Local 206 will itself suffer the prejudice which almost always operates to the detriment of the trade union rather than to the employer. In any case, Local 206's conduct in this respect cannot excuse the conduct of Knob Hill.

47. The evidence before the Board does indicate that further collective bargaining between

the parties would likely result in some of the matters which remain outstanding between them being resolved. However, we are not satisfied that further collective bargaining would be likely to result in a collective agreement. Rather, we are satisfied that the process of collective bargaining between the parties has been unsuccessful.

48. To summarize, we are satisfied that the conduct of Knob Hill as aforesaid, including its initial refusal to even meet to bargain, its subsequent attempts to delay the commencement of bargaining, and its refusal to provide Local 206 with accurate collective bargaining information to which the union was clearly entitled, amount to a refusal by Knob Hill to accept or recognize the bargaining authority of Local 206, and constitute a failure of the company to make reasonable or expeditious efforts to conclude a collective agreement with Local 206. We are also satisfied that Knob Hill was engaged in no more than surface bargaining. Its positions in bargaining with respect to management rights, wages, benefits, and classifications (the very foundation of a collective agreement) were both uncompromising and adopted without reasonable justification, and amount to a failure by Knob Hill to make reasonable or expeditious efforts to conclude a collective agreement.

49. We are satisfied that the process of collective bargaining between the parties has been unsuccessful because of Knob Hill's refusal to recognize the bargaining authority of Local 206, the uncompromising positions adopted in bargaining by Knob Hill without reasonable justification, and the failure of Knob Hill to make reasonable or expeditious efforts to conclude a collective agreement.

50. We are satisfied that Knob Hill's conduct, and its approach to bargaining, were designed to not only defeat collective bargaining, but also to communicate to bargaining unit employees a very simple message: unionization has not and will not bring you anything. That this message was received by the employees is demonstrated by the evidence of Susan Caterina, the applicant in the termination proceeding, who testified before the Board that "I just know the union hasn't done anything for us" and who, in preparing to bring her application, circulated a letter soliciting support, which letter contains the following statement:

I don't believe that the Union has done anything for us since it got in and I don't want to start paying union dues each month for the same wages and benefits we would have received with or without a union.

(In that regard, see *Peacock Lumber Limited*, [1990] OLRB Rep. May 584).

51. The sections of the *Labour Relations Act* which provide for the termination of a trade union's bargaining rights contemplate that the trade union which has been certified by the Board will have some time (a minimum of six months in the construction industry and one year outside of the construction industry) to prove itself to the employees it represents. In our view, Local 206 has not had that opportunity in its relations with the employees of Knob Hill. While Local 206 has itself contributed to that situation, its primary cause is the product of Knob Hill. In the circumstances, including the certification of Local 206 pursuant to section 8 of the Act, Knob Hill's failure to comply with the directions of the Petryshen panel, the dates of the two applications herein, and the conduct of Knob Hill and the effect of that conduct, we find it appropriate, in the exercise of our discretion under section 40a(22) of the Act to consider the first contract application herein first.

52. In the circumstances herein, and having regard to our findings as aforesaid, the Board finds it appropriate to direct that a first collective agreement between Knob Hill Farms Limited and the United Food and Commercial Workers Union, Local 206 be settled by arbitration. Pursu-

ant to section 40a(22) of the Act, the termination application in Board File No. 1545-89-R is therefore dismissed.

DECISION OF BOARD MEMBER JAMES A. RONSON; April 9, 1991

1. The United Food & Commercial Workers Union, Local 206 (the Union or UFCW, Local 206) has applied for a direction that a first collective agreement be settled by arbitration as between it and Knob Hill Farms Limited (the Employer). As well, Susan Caterina has applied on behalf of a group of employees (the Petitioners) for an order directing a vote to determine whether or not the bargaining rights of the Union should be terminated.

2. With this situation of conflicting applications the *Labour Relations Act* (the Act) stipulates that the Board must choose which application to hear and determine first. This choice is an exercise of pure discretion and, as in this case, is essentially fact-driven. In order to facilitate the exercise of its discretion the Board ordered that the two applications be heard together.

3. Mr. Gordon, counsel for the Employer, filed a comprehensive, chronological statement of the facts in issue. Mr. Gordon led evidence to prove these facts, item by item, during the hearing. Whenever possible, I have quoted verbatim from the Employer's statement of fact and I am indebted to Mr. Gordon for making my task that much easier.

4. FACT:

- 4.1 **March 6, 1986** - UFCW, Local 206 organizing campaign starts at the Oshawa store. Between March 6 and March 21, 1986, 85 membership cards are obtained.
- 4.2 **May, 1986** - UFCW, Local 206 receives permission to enter merger discussions with UFCW Locals 175, 409 and 486.
- 4.3 **May 23, 1986** - UFCW, Local 206 applies to the OLRB for certification as bargaining agent of the employees of the Employer at Oshawa, Ontario.
- 4.4 **May 29, 1986** - Donna Baydak begins the circulation of a petition against the Union's certification application.
- 4.5 **June 7, 1986** - is the terminal date for the certification application. For the period between March 21 and June 7, 1986 the Union obtains signatures on 24 cards. For the period between May 29 and June 7, 1986, Donna Baydak obtains the signatures of 156 people on a petition against the certification of the Union.
- 4.6 **June 19, 1986** - first hearing by the Board at which the certification application and a section 89 application are consolidated for the purposes of hearing.
- 4.7 **August 15, 1986** - evidentiary hearings before the Board commence and continue over 14 days of hearing, concluding on February 19, 1987.
- 4.8 **November 1, 1986** - UFCW, Local 206 and its counsel (Messrs. Ahee

and Associates) believe and subsequently assert at a later date that UFCW, Local 206 has successfully consummated a merger. The International Executive Committee of the UFCW approves the merger effective that date and determines that the merged locals will be known as the United Food & Commercial Workers Union, Local 175.

- 4.9 **February 19, 1987** - hearings before the Board are completed. No mention is made during the course of hearing by counsel for UFCW, Local 206 or anyone on behalf of Local 206 that a merger has occurred. There is no evidence adduced before the Board of management support for or complicity in the petition of Donna Baydak.
- 4.10 **December 22, 1987** - the Board releases its decision certifying UFCW, Local 206 as bargaining agent pursuant to s.8 of the Act. The Board finds that the Employer committed unfair labour practices and orders the reinstatement of 14 employees.

5. COMMENT:

The decision of the Board was released approximately 11 months after the hearings were completed. That is a period which is 4 months longer than the period in which the parties were able to bargain before the first contract application was filed by the Union.

6. FACT:

- 6.1 **January 4, 1988** - the Employer seeks reconsideration of the certification decision of the Board.
- 6.2 **January 15, 1988** - UFCW, Local 206 sends a notice to bargain to the Employer. No copy of the letter is sent to Messrs. Ahee and Associates (counsel to Local 206) and no copy is sent to UFCW, Local 175. *The letter notes, "Our proposals will follow shortly".* (emphasis added)
- 6.3 **January 28, 1988** - the Employer advises UFCW, Local 206 that it has received the notice to bargain. The letter also advises that the Employer has asked the Board to reconsider its decision as "the first step in the review process of this decision".
- 6.4 **March 2, 1988** - the Board releases its decision denying the Employer's request for reconsideration.
- 6.5 **March 25, 1988** - Donna Baydak and 156 objecting employees apply for Judicial Review.
- 6.6 **March 27, 1988** - the Employer applies for Judicial Review.
- * 6.7 **April 7, 1988** - the Board renders its decision in the *Villette China* case, wherein UFCW, Local 175 is recognized as the successor of UFCW, Local 206.
- 6.8 **April 13, 1988** - counsel for the Employer writes to counsel for

UFCW, Local 206 requesting a list of dates "...upon which the appropriate union representatives may be available for a first meeting..." and also for a "...draft form of collective agreement which he wishes to discuss in advance of whatever date comes to be selected as being an appropriate one for the first meeting..."

7. COMMENT:

The Employer, in April, 1988 is requesting meeting dates and the union proposals which were "to follow shortly" after the letter of January 15, 1988.

8. FACT:

- 8.1 **April 25, 1988** - James Hastings, business representative of UFCW, Local 175 (and previously the organizer for UFCW, Local 206 in the certification proceedings) writes, putting forward suggested dates for meeting. His letter states that *UFCW, Local 175* will forward a draft form of collective agreement and a list of the negotiating committee. No copy of this letter is sent to UFCW, Local 206. (emphasis added)
- 8.2 **April 22, 1988** - counsel for the Employer writes to James Hastings of UFCW, Local 175 suggesting May 31 and June 1 for meetings.
- 8.3 **April 26, 1988** - James Hastings, on behalf of UFCW, Local 175, rejects the suggested dates. His letter refers to a notice to bargain sent by UFCW Local 175 on January 15, 1988.

9. COMMENT:

The notice to bargain of January 15, 1988 was sent by UFCW, Local 206.

10. FACT:

- 10.1 **April 26, 1988** - UFCW, Local 175, by its counsel (Messrs. Ahee and Associates, who had been counsel for UFCW, Local 206) apply for conciliation. The application erroneously states that UFCW, Local 175 gave notice to bargain on January 15, 1988.

11. COMMENT:

At the date of the request for conciliation, the Employer had not received any proposals as mentioned in the letter of January 15, 1988. No notice of merger or successorship between UFCW, Local 206 and UFCW, Local 175 had to this point in time been given to the Employer *or to its employees*. Copies of the UFCW, Local 175 correspondence, including the application for conciliation, were not forwarded to UFCW, Local 206.

12. FACT:

- 12.1 **April 29, 1988** - the Employer objects to the appointment of a conciliation officer.
- 12.2 **May 5, 1988** - UFCW, Local 175 writes to the Minister of Labour stating that the Employer by its January 28, 1988 letter "...essentially

refused to meet with the union...". A copy of this letter goes to "James Hastings UFCW, Local 175", but not to Ron Springall, the President of Local 206.

- 12.3 **May 11, 1988** - James Hastings of UFCW, Local 175 writes to counsel for the Employer seeking bargaining information. No copy of this letter is sent to Mr. Springall or to UFCW, Local 206. A copy is sent to Messrs. Ahee and Associates.
- 12.4 **May 12, 1988** - the Employer sends notices of recall to 14 employees (see paragraph 4.10).
- 12.5 **May 12, 1988** - counsel for the Employer writes to the Assistant Deputy Minister of Labour further objecting to the appointment of a conciliation officer at the request of UFCW, Local 175 and referring to the provisions of section 67 of the Act.

13. COMMENT:

Section 67 of the Act makes it illegal for the Employer to bargain with UFCW, Local 175 when UFCW, Local 206 is certified as the bargaining agent for the employees.

14. FACT:

- 14.1 **May 25, 1988** - Messrs. Ahee and Associates write to the Office of Arbitration, to the attention of G.R. Thompson, Deputy Minister, advising that "...effective November 1, 1986, UFCW Local 206 merged with UFCW Local 175". The letter states further that "the merger has been recognized in Board file #3154-37-R, UFCW Local 175 and Vilette China Canada Limited". The letter is not addressed to the Assistant Deputy Minister of Labour to whom all previous correspondence has been directed on this matter. No copy of the letter is sent to Ron Springall or to UFCW, Local 206.
- 14.2 **June 22, 1988** - Counsel for 156 objecting employees writes a letter asking that bargaining information not be released by the Employer.
- 14.3 **June 23, 1988** - The Deputy Minister of Labour writes to counsel for UFCW, Local 175 and advises that the question of his authority to appoint a conciliation officer at the request of that union will be referred to the Labour Relations Board for its advice pursuant to section 107 of the Act.
- 14.4 **June 27, 1988** - the Union commences contempt proceedings against the Employer.
- 14.5 **June 28, 1988** - Messrs. Ahee and Associates write to the Registrar of the Board requesting that the 107 reference be brought on before the Board "forthwith". No copy of this letter is sent to UFCW, Local 206 or to Ron Springall.
- 14.6 **June 29, 1988** - counsel for the Employer writes to James Hastings, the business representative of UFCW, Local 175 and declines to give

the information requested on May 11, 1988 because UFCW, Local 206 is the bargaining agent, not UFCW, Local 175.

14.7 **June 30, 1988** - the Registrar of the Board sends out notice of hearing pursuant to section 107 of the Act, appointing July 14, 1988 as the hearing date.

14.8 **July 6, 1988** - UFCW, Local 175 sends a grievance to the Employer.

14.9 **July 11, 1988** - UFCW, Local 175 convenes a meeting of employees to formulate contract proposals.

15. COMMENT:

Presumably, these are the proposals that were to "follow shortly" after the letter of January 15, 1988.

16. FACT:

16.1 **July 14, 1988** - at the s.107 hearing before the Board the question of notice to employees is raised. A majority of the panel (the Knopf panel) rule that the section 107 hearing be adjourned to the week of August 15, 1988 and that the trade union file, by July 21, 1988, particulars of the facts and circumstances upon which "...the claim of merger is based". The decision is reduced to writing and issues on July 28, 1988.

16.2 **July 20, 1988** - United Food and Commercial Workers *International* Union, Local 175 applies to the Board pursuant to a Ministerial reference under section 107 of the Act for a declaration that the United Food and Commercial Workers *International* Union, Local 175, "has acquired the rights, privileges and duties of its predecessor the United Food and Commercial Workers *International* Union, Local 206 by reason of a merger, amalgamation or transfer of jurisdiction". The application is made by Messrs. Ahee and Associates on behalf of UFCW, Local 175.

17. COMMENT:

This is the first time any reference has been made to an entity known as the United Food and Commercial Workers *International* Union, Local 175.

18. FACT:

18.1 **July 26, 1988** - The United Food and Commercial Workers *International* Union, Local 175 files a section 89 complaint with the Board against the Employer and Donna Baydak. Messrs. Ahee and Associates are identified as being counsel to the complainant in the complaint.

18.2 **July 28, 1988** - the written decision of the Knopf panel issues.

18.3 **August 8, 1988** - Ron Springall on behalf of UFCW, Local 206 files a

reply in the section 107(2) application and takes the position that the “United Food and Commercial Workers *International* Union, Local 175 has acquired the rights, privileges, and duties of its predecessor United Food and Commercial Workers, Local 206 by reason of a merger, amalgamation or transfer of jurisdiction”, and identifies that Messrs. Ahee and Associates constitute one of two addresses for service on UFCW, Local 206.

- 18.4 **August 9, 1988** - the Employer files its reply in the s.107(2) case and takes the position, among others, that no proper notice has been given to the employees of the merger and that the materials filed are otherwise defective.
- 18.5 **August 10, 1988** - Michael Horan, counsel for the 156 objecting employees, files an intervention in the s.107(2) proceedings.
- 18.6 **August 17, 1988** - the s.107(2) application is heard by the Board (the first Gray panel) and on August 18, 1988 the first Gray panel renders a decision that UFCW, Local 175 cannot be declared to be the successor to UFCW, Local 206 and that the Minister of Labour cannot appoint a conciliation officer. UFCW, Local 206 does not attend at the hearing nor does anyone on its behalf.
- 18.7 **August 19, 1988** - the Employer enters an appearance in court in the contempt application launched by UFCW, Local 206.

19. COMMENT:

At this stage in the proceedings it would appear that the employees are in a quandary concerning who is their bargaining agent. UFCW, Local 206 has advised the Board that it no longer acts as the bargaining agent, but the Board has held that UFCW, Local 175 does not hold bargaining rights for them. Eight months have gone by without any bargaining because of this problem.

20. FACT:

- 20.1 **August 25, 1988** - UFCW, Local 206 retains new solicitors who make application for the appointment of a conciliation officer and seek reconsideration of the original certification decision so that the certification will be amended by substituting UFCW, Local 175 in the place and stead of Local 206.
- 20.2 **August 25, 1988** - Messrs. Ahee and Associates write to the Board indicating that they now act for UFCW, Local 175 and ask to be added as a party to any proceedings arising out of the request for reconsideration.

21. COMMENT:

The employees know a little more by now. UFCW, Local 206, by its request for the appointment of a conciliation officer seems willing to bargain on their behalf. However, by reason of its reconsideration application, UFCW Local 206 would seem to be saying that it is UFCW, Local 175 that should have been bargaining for the employees right from the start.

22. FACT:

- 22.1 **August 31, 1988** - the Employer, by its counsel opposes the request of UFCW, Local 206 for the appointment of a conciliation officer.
- 22.2 **September 12, 1988** - a further letter is written by counsel for the Employer opposing both the request for reconsideration of the original certification decision and the appointment of a conciliation officer.
- 22.3 **September 15, 1988** - the Minister of Labour advises counsel for UFCW, Local 175 that he has no authority to appoint a conciliation officer at the request of that union.
- 22.4 **September 16, 1988** - counsel for the Employer writes to the Registrar of the Board setting forth reasons for the Employer's opposition to the reconsideration of the original certification decision.
- 22.5 **September 20, 1988** - counsel for UFCW, Local 206 (Messrs. Sack, Charney) reply to the submissions of the Employer and ask the Minister of Labour to appoint a conciliation officer.
- 22.6 **September 23, 1988** - counsel for the Employer writes to the Deputy Minister of Labour correcting certain assertions of fact made in the letter by Messrs. Sack, Charney on September 20, 1988.
- 22.7 **October 5, 1988** - the Registrar of the Board sends notice that the question of the appointment of a conciliation officer at the request of UFCW, Local 206 has been referred to the Board by the Minister and that hearings are scheduled to begin on October 17, 1988.
- 22.8 **October 5, 1988** - the Employer is advised by telegram from the Registrar of the Board that the hearing scheduled for the reconsideration of the original certification decision has been adjourned.
- 22.9 **October 17, 1988** - hearings begin before the Board (the second Gray panel) on the section 107 reference arising from the request for a conciliation officer by UFCW, Local 206. The second Gray panel renders a decision on November 8, 1988 that the Minister of Labour does have authority to appoint an officer at the request of UFCW, Local 206.
- 22.10 **November 14, 1988** - the Employer seeks further reconsideration of the original certification decision on the basis, *inter alia*, that the true state of affairs of UFCW, Local 206 was not put before the Board in the original certification hearing.
- 22.11 **November 17, 1988** - the Minister of Labour appoints D. Nelson as conciliation officer.
- 22.12 **November 28, 1988** - UFCW, Local 206 objects to the Employer request for reconsideration of the original certification decision. The request by the Employer and the reconsideration request by UFCW,

Local 175 are subsequently scheduled by the Board to be heard together, and after a number of adjournments are scheduled for hearing before the original panel of the Board on August 29, 1989 and October 10, 1989.

- 22.13 **December 21, 1988** - the parties meet in negotiations with conciliation officer D. Nelson and UFCW, Local 206 table its proposals for a first collective agreement.

23. COMMENT:

The employees at the Oshawa store know now that UFCW, Local 206 appears willing to get on with bargaining with the Employer and has delivered the proposals mentioned in its letter some 11 months before (January 15, 1988). However UFCW, Local 175 is still asserting that it is entitled to the bargaining rights for the employees.

24. FACT:

- 24.1 **January 6, 1989** - the Registrar of the Board sends to the Employer copies of a document filed in the reconsideration proceedings and purporting to contain the signatures of 121 employees of the Employer who are objecting to the certification of the union.

25. FACT:

Following the sequence of events in 1988 involving UFCW, Locals 206 and 175, a reasonable employee at the Oshawa store might wonder what in the world was going on? At this stage it is worthwhile examining some of the evidence of Ron Springall given for UFCW, Local 206 during cross-examination. Mr. Springall testified:

- (a) that his position as President of UFCW, Local 206 expired in 1988, but a letter from the International President appointed him to continue and he still considers himself to be President and *the only officer of Local 206*;
- (b) that all the members of UFCW, Local 206 (save for the employees at the Oshawa store who signed application cards) have been transferred to UFCW, Local 175;
- (c) that all cash assets of UFCW, Local 206 have been transferred to UFCW, Local 175;
- (d) that James Hastings left UFCW, Local 206 and went to UFCW, Local 175 in *November, 1986* (during the organizing campaign at the Oshawa store);
- (e) that he didn't know if UFCW, Local 206 had ever been in touch with the employees at the Oshawa store to approve bargaining proposals. Usually there is such a meeting, but he did not know if it was called by UFCW Local 175;
- (f) that he had no contact with the employees at the Oshawa store dur-

ing bargaining and "... (knew) that other union reps did by letter using 175's letterhead";

- (g) that he may not have been aware of the "merger" before May, 1988 and the Employer would not have known in April, 1988 that UFCW, Local 175 was acting for UFCW, Local 206;
- (h) that he personally felt the "merger" was incomplete and so advised the International President in the summer of 1988;
- (i) that he learned of the conciliation request by UFCW, Local 175 after it was made;
- (j) that although he considered the merger incomplete, he did not direct such instruction to Messrs. Ahee and Associates. He did not ask "WHY?" when asked to sign the intervention by UFCW, Local 206 in the merger application by UFCW, Local 175, *and went ahead and signed it even though the information it contained was misleading and did not give the true story of what was happening between UFCW, Locals 206 and 175;*
- (k) that he had not been aware that no lawyer represented UFCW, Local 206 before the first Gray panel of the Board;
- (l) that he did not give instructions to Messrs. Sack, Charney in the hearing before the second Gray panel of the Board and *presumed* that persons assigned by the International Union gave such instructions;
- (m) that the employer should have known what was going on and continued to bargain with UFCW, Local 206 "because the lawyers would have told it".

26. COMMENT:

It is clear that the employees at the Oshawa store never did learn what was going on from their Local President, Mr. Springall. They know now that UFCW, Local 206 has no elected officers and no assets. It has had an appointed President since 1988. And it has no members save for those employees who signed application cards 5 years ago and who remain only "conditional members" until a collective agreement is in place and they begin paying dues.

27. COMMENT:

Before continuing on with the chronological recital of the bargaining it may be an appropriate time to note that Mr. Springall was quite frank in his assessment of the Employer's motives going into bargaining. He felt that the employer had no intention of ever signing a collective agreement voluntarily, and was working in collusion with the employees at the store to get UFCW, Local 206 decertified.

28. FACT:

28.1 **January 11, 1989** - the Employer and UFCW, Local 206 meet to bar-

gain and the Employer tables its proposals for a first collective agreement.

- 28.2 **January 18, 1989** - the Employer provides Mr. Springall with a list of employees of the Oshawa store together with their respective dates of hire. The employer advises that in view of the correspondence received from the Registrar of the Board relating to the petitioning employees that it believes it is "...incumbent upon us to continue with the non-monetary issues and await the Minister's response".
- 28.3 **January 18, 1989** - the Board adjourns the reconsideration applications on its own volition.
- 28.4 **January 27, 1989** - the Board schedules further hearing dates for the reconsideration applications.
- 28.5 **February 1, 1989** - the Union tables further proposals in response to those of the Employer.
- 28.6 **February 3, 1989** - Union counsel writes to the Board adjourning the reconsideration hearings.
- 28.7 **February 9, 1989** - the second Gray panel of the Board provides its written reasons for its decision on the section 107 application by UFCW, Local 175.
- 28.8 **February 9, 1989** - the Employer responds to the proposals of the Union filed in negotiations.
- 28.9 **February 14, 1989** - Messrs. Ahee and Associates write to the Board on behalf of UFCW, Local 206 with respect to the statement of desire forwarded by the Board to the parties.
- 28.10 **February 15, 1989** - the Employer writes to the Board regarding the statement of desire and in connection with the adjournment of the reconsideration applications.

29. FACT:

- 29.1 **February 16, 1989** - the Employer tables a response to the Union proposals and the Union files further proposals on the same day.
- 29.2 **February 23, 1989** - the Employer provides a further response to the Union proposals.
- 29.3 **March 2, 1989** - the Board advises the parties that the reconsideration applications have been adjourned further.
- 29.4 **May 1, 1989** - on consent of the parties the Board issues an order and direction terminating the section 89 proceedings brought by the United Food and Commercial Workers *International* Union and UFCW, Local 206. (see paragraph 18.1)

- 29.5 **May 16, 1989** - further Employer response to Union proposals. The Employer also provides the Union with the wage rates payable to the employees as at week ending December 18, 1988, pursuant to the consent order of the Board.
- 29.6 **May 31, 1989** - the Union changes its position with respect to the wage rates that it wants and the Employer provides the Union with a revised wage schedule as at May 20, 1989.
- 29.7 **June 9, 1989** - the Divisional Court of the Supreme Court dismisses the application for judicial review brought by Donna Baydak on behalf of 156 objecting employees and dismisses the application of the Employer for judicial review.
- 29.8 **June 13, 1989** - the United Food and Commercial Workers *International* Union, Local 206 files a section 89 complaint on behalf of an employee who had been disciplined by the Employer.
- 29.9 **June 13, 1989** - *the Union tables a proposal to resolve all matters in dispute*. Without prior notice to the Employer the Union requests a "No Board Report" from the conciliation officer and terminates negotiations.

30.

FACT:

- 30.1 **June 21, 1989** - the Board writes to the parties confirming hearing dates for the reconsideration applications.
- 30.2 **June 22, 1989** - the Employer writes to the Chief Conciliation Officer for the Province of Ontario opposing the issuance of a no board report for the reasons found in the submission.
- 30.3 **June 23, 1989** - notice of motion for leave to appeal the decision of the Divisional Court is filed by counsel for Donna Baydak on behalf of 156 objecting employees.
- 30.4 **July 14, 1989** - Messrs. Ahee and Associates, writing on behalf of the United Food and Commercial Workers *International* Union, Local 206 write a letter opposing the Employer's objections to the issuance of a no board report.
- 30.5 **July 28, 1989** - The Minister of Labour advises the parties that he has decided not to appoint a Board of Conciliation.
- 30.6 **August 4, 1989** - the Union files an application to the Board for an order directing that the first contract with the Employer be settled by arbitration (the first contract application).

31.

FACT:

- 31.1 **August 21, 1989** - the Board stays the first contract application until such time as a panel of the Board (the Petryshen panel) has disposed

of the various reconsideration applications of the original section 8 certification decision.

- 31.2 **August 29, 1989** - the Petryshen panel directs the Employer, UFCW, Local 206 and UFCW, Local 175 to make written submissions on the issues which have been raised by the various reconsideration requests.
- 31.3 **September 6, 1989** - the Board sets further dates for the hearing of the reconsideration applications.
- 31.4 **September 7, 1989** - Susan Caterina, on behalf of a group of employees applies for a declaration terminating the bargaining rights of the United Food and Commercial Workers Union, Local 206.
- 31.5 **October 3, 1989** - the Employer and the Union complete their filing of submissions on the reconsideration applications.
- 31.6 **October 24, 1989** - the Petryshen panel decides to allow the Employer to call evidence relating to its submissions in the reconsideration proceedings.
- 31.7 **November 2, 1989** - the Board orders that the first contract application and the termination application should be scheduled to be heard together so that the Board could hear "...all of the evidence relating to both these applications before deciding which, if any, of the applications it will grant. The manner of proceeding in order to hear that evidence will be left to be determined by the panel hearing those applications".
- 31.8 **January 31, 1990** - the Petryshen panel issues its decision denying the Employer's request for reconsideration and granting leave to UFCW, Local 175 and UFCW, Local 206 to withdraw their applications for reconsideration.

32. EXERCISE OF DISCRETION:

Over 5 years have passed since the Union began its organizing drive at the Oshawa store. It has been over 3 years since the Board certified the Union; - not by reason of the wishes of a majority of employees, but according to the Board's own assessment of the situation under section 8 of the Act. A lot has happened in this world during this period of time. We have watched events unfold in Nicaragua and the Baltic States. We have seen secret votes conducted under the shadow of an iron fist. Some may have been surprised, but the results of such votes raise doubts about the explicit premise found in section 8 of the Act. We have learned that, in the privacy of the voting booth, people have the nasty habit of telling even those whom they may fear what they really want.

33. I am mindful that the Board has always been concerned with people rather than organizations. The preamble to our Act makes this very clear. People, by their own free choice, are entitled to organize into trade unions which, according to civil law, have no legal persona apart from the people who belong to them.

34. Examining the choice before the Board: - if we choose to deal with the first contract

application before the termination application, then we are embarking on a road that could lead to an organization acting as bargaining agent for and receiving dues from the employees for a further 2 years. And what is the nature of this organization, UFCW, Local 206? It is a union with no elected officers and a president appointed by the International Union. It has no cash assets and no members other than those employees who signed application cards and who were in the majority at the time of certification. It has held no meetings of the employees since at least January, 1988. It has appeared to voluntarily surrender its bargaining rights to another union and then grab them back. It has never explained the tortuous, often farcical state of its merger affairs to its members and has been less than frank, and even misleading, with the information it presented to the Board. Over a year of good bargaining time was lost because it could not put its house in order. And, in its cynical approach to the system, it conducted bargaining with only one object - to manoeuvre matters to the stage where it could apply for an arbitrated first contract. Even its draft contract, filed with the Board, contains no wage proposals but reads "to be negotiated" under that head. Recall, that on June 13, 1989 the Union filed a proposal to resolve all matters in dispute (see paragraph 28.9).

35. With these facts before us, the discretionary choice really boils down to this. Do we choose to hear the application of an organization whose viability is seriously in doubt, or do we hear the application of the people who are its only reason for still being in existence? If we are interested in people then we will listen to these employees, who are the sole supporting group for the Union, when they petition us for the opportunity to tell us how they wish to organize their working lives. If we are interested in people we will cease trying to tell them what we think is best for them.

36. I believe that the people who are caught up in this sad, sorry series of events deserve the opportunity to be heard. In the exercise of my discretion, in fairness and in equity, I would determine the termination application first.

37. THE DECISION:

We heard the testimony of Susan Caterina as to the voluntariness of the termination petition. Her testimony was not seriously challenged during cross-examination, nor was there any evidence of Employer involvement in the petition. (The Board has never heard any evidence of Employer involvement in any of the petitions brought before it by the employees at the Oshawa store). The signatures of the employees were obtained off the premises of the store during the non-working time of the employees. To her knowledge, the Employer was unaware that Susan Caterina was taking up the petition, and we heard nothing contrary from the Union. The petition was in her possession at all times. The petition contains the signatures of more than 50% of the employees at the store.

38. I would order a vote of the employees at the store as of this date and who do not voluntarily terminate their employment before the date of the vote. They should be asked if they still wish to have the United Food & Commercial Workers Union, Local 206 represent them as their bargaining agent. Having so decided, I would further order that the Union's first contract application be dismissed.

2843-90-R; 2914-90-R International Brotherhood of Electrical Workers, Local 636, Applicant v. **The Metropolitan General Hospital**, Respondent v. Service Employees' International Union, Local 210, Intervener; International Brotherhood of Electrical Workers, Local 636, Applicant v. The Salvation Army Grace Hospital, Respondent, v. Service Employees' International Union, Local 210, Intervener

Certification - Hospital Labour Disputes Arbitration Act - Timeliness - IBEW seeking to displace SEIU as bargaining agent at two hospitals - IBEW filing certification application 4 weeks prior to release of interest arbitration award at first hospital and 2 weeks after interest arbitration award at second hospital - Both applications dismissed as untimely under Hospital Labour Disputes Arbitration Act and Labour Relations Act - Board dismissing request to impose bar with respect to future applications by IBEW

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *W. H. Wightman* and *C. McDonald*.

APPEARANCES: *B. Fishbein*, *C. McKenzie* for the applicant; no one appearing for the respondents; *S. Krashinsky*, *K. Brown* for the intervener.

DECISION OF THE BOARD; April 26, 1991

1. These are applications for certification in which the applicant (also referred to as "IBEW") is seeking to displace the intervener (also referred to as "SEIU") as the bargaining agent for employees of The Metropolitan General Hospital (also referred to as "Metropolitan") and The Salvation Army Grace Hospital (also referred to as "Grace"). In both cases a pre-hearing vote was requested and held. The ballot boxes were sealed pending a determination of SEIU's objection to the timeliness of both applications. In its decision dated April 8, 1991 the Board dismissed both applications as untimely under the *Labour Relations Act* (hereinafter referred to as the "Act") and the *Hospital Labour Disputes Arbitration Act* (hereinafter referred to as the "HLDAA"). The Board also denied SEIU's request that the Board bar IBEW from making any further certification applications in respect of the employees affected in the present cases. These are the reasons for that decision.

The Facts

2. The facts of the two cases are similar and the parties agreed to deal with both matters simultaneously.

3. In the first case SEIU and Metropolitan were parties to a collective agreement with a term of April 1, 1987 to March 31, 1989. SEIU served notice to bargain under section 53 of the Act on January 9, 1989 and applied for conciliation on April 4, 1989. A conciliation officer was appointed (the precise date of the appointment was not disclosed). The equivalent of a "no board" report under section 3 of the HLDAA was issued on February 8, 1990 and the parties thereafter proceeded to establish an interest board of arbitration. Prior to the hearing before the interest board of arbitration the parties had agreed upon a number of matters to be included in the next collective agreement. Among the items agreed (which, in fact, appear to have included everything except wages) was an agreement that the term of the resulting collective agreement would run from April 1, 1989 to March 31, 1991. The interest arbitration hearing was held on November 16, 1990 and the present application was filed on February 1, 1991 before the interest board of arbitration issued its award dated February 28, 1991.

4. With one significant exception, the facts surrounding the application at Grace are remarkably similar. SEIU and Grace were parties to a collective agreement with a March 31, 1989 expiry date. SEIU provided notice to bargain under section 53 on January 9, 1989 and applied for conciliation on April 4, 1989. Again, we were not advised of the precise date of the appointment of the conciliation officer. However, the HLDAA equivalent of a "no board" issued on November 16, 1989 and the parties thereafter established an interest board of arbitration. Among the items agreed to between the parties prior to the arbitration hearing was that the term of the next collective agreement would be April 1, 1989 to March 31, 1991. The arbitration hearing was held on July 24, 1990 and the award issued on January 25, 1991 (indicating the same term agreed to by the parties). The present application was filed on February 8, 1991.

5. As will become evident the facts for our purposes in these cases are virtually identical. In both cases the applications were filed after the commencement of the last two months of the April 1, 1989 to March 31, 1991 term the parties had agreed to. In the Metropolitan case the application was filed prior to the release of the award of the interest board of arbitration. At Grace, the application was filed some two weeks after the release of the interest award.

6. Section 5(4) of the Act provides:

5.-(4) Where a collective agreement is for a term of not more than three years, a trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last two months of its operation.

7. There was no dispute that both Metropolitan and Grace are hospitals within the meaning of section 1(1)(a) of the HLDAA. Reference must also be made to the following sections of HLDAA:

2.- (2) Except as modified by this Act, the *Labour Relations Act* applies to any hospital employees to whom this Act applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.

3. Where a conciliation officer appointed under section 16 of the *Labour Relations Act* is unable to effect a collective agreement within the time allowed under section 18 of that Act, the Minister shall forthwith by notice in writing inform each of the parties that the conciliation officer has been unable to effect a collective agreement, and section 17 and 19 of the *Labour Relations Act* shall not apply.

4. Where the Minister has informed the parties that the conciliation officer has been unable to effect a collective agreement, the matters in dispute between the parties shall be decided by arbitration in accordance with this Act.

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10.-(1) Where, during the bargaining under this Act or during the proceedings before the board of arbitration, the parties agree on all the matters to be included in a collective agreement, they shall put them in writing and shall execute the document, and thereupon it constitutes a collective agreement under the *Labour Relations Act*.

(2) If the parties fail to put the terms of all the matters agreed upon by them in writing or if having put the terms of their agreement in writing either of them fails to execute the document within seven days after it was executed by the other of them, they shall be deemed not to have made a collective agreement, and the provisions of section 3 and 4 or sections 6 and 9, as the case may be, shall apply.

(3) Where, during the bargaining under this Act or during the proceedings before the board of arbitration, the parties have agreed upon some matters to be included in the collective agree-

ment and have notified the board in writing of the matters agreed upon, the decision of the board shall be confined to the matters not agreed upon by the parties and to such other matters that appear to the board necessary to be decided to conclude a collective agreement between the parties.

(4) Where the parties have not notified the board of arbitration in writing that, during the bargaining under this Act or during the proceedings before the board of arbitration, they have agreed upon some matters to be included in the collective agreement, the board shall decide all matters in dispute and such other matters that appear to the board necessary to be decided to conclude a collective agreement between the parties.

(5) Within five days of the date of the decision of the board of arbitration or such longer period as may be agreed upon in writing by the parties, the parties shall prepare and execute a document giving effect to the decision of the board and any agreement of the parties, and the document thereupon constitutes a collective agreement.

(6) If the parties fail to prepare and execute a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties within the period mentioned in subsection (5), the parties or either of them shall notify the chairman of the board in writing forthwith, and the board shall prepare a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties and submit the document to the parties for execution.

(7) If the parties or either of them fail to execute the document prepared by the board within a period of five days from the day of its submission by the board to them, the document shall come into effect as though it had been executed by the parties and the document thereupon constitutes a collective agreement under the *Labour Relations Act*.

(8) Except in arbitrations under section 8, the date the board of arbitration gives its decision is the effective date of the document that constitutes a collective agreement between the parties.

(9) The date the board of arbitration gives its decision under section 8 upon matters of common dispute shall be deemed to be the effective date of the document that constitutes a collective agreement between the parties.

(10) Except where the parties agree to a longer term of operation, any document that constitutes a collective agreement between the parties shall remain in force for a period of one year from the effective date of the document.

(11) Notwithstanding the provisions of subsection (10) and except where the parties agree to a longer term of operation, a document that constitutes a collective agreement shall cease to operate on the expiry of a period of two years,

- (a) from the day upon which notice was given under section 14 of the *Labour Relations Act*; or
- (b) from the day upon which the previous collective agreement ceased to operate where notice was given under section 53 of the *Labour Relations Act*.

(12) Where under subsection (11), the period of two years has expired on or will expire within a period of less than ninety days from the date the board of arbitration gives its decision, the document that constitutes a collective agreement shall continue to operate for a period of ninety days from the date the board of arbitration gives its decision for the purposes of subsection 5(4), subsection 53(1) and subsection 57(2) of the *Labour Relations Act*.

(13) In making its decision upon matters in dispute between the parties, the board of arbitration may provide,

- (a) where notice was given under section 14 of the *Labour Relations Act*, that any of the terms of the agreement except its term of operation shall be

retroactive to such day as the board may fix, but not earlier than the day upon which such notice was given; or

- (b) where notice was given under section 53 of the *Labour Relations Act*, that any of the terms of the agreement except its term of operation shall be retroactive to such day as the board may fix, but not earlier than the day upon which the previous agreement ceased to operate.

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12.-(2) Notwithstanding section 61 of the *Labour Relations Act*, where notice has been given under section 53 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of employees of a hospital to or by the employer of such employees and the Minister has appointed a conciliation officer, an application for certification of a bargaining agent of any of the employees of the hospital in the bargaining unit defined in the collective agreement or an application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit defined in the agreement shall not be made after the day upon which the agreement ceased to operate or the day upon which the Minister appointed a conciliation officer, whichever is later, except in accordance with section 5 or subsection 57(2) of the *Labour Relations Act*, as the case may be.

The Positions of the Parties

8. SEIU argues as follows in support of its position that both applications are untimely: once a collective agreement expires and a conciliation officer is appointed no displacement (or termination) application can be brought until the appropriate open period under the subsequent collective agreement. Reference was made to section 12(2) of the HLDAA and to decisions of the Board in *London and District Service Workers' Union, Local 220*, [1985] OLRB Rep. Oct. 1490; *The Bobier Convalescent Home*, [1983] OLRB Rep. June 863; *Nel-Gor Castle Nursing Home*, [1979] OLRB Rep. Oct. 1013; *Salvation Army Grace Hospital*, [1978] OLRB Rep. Dec. 1142; and *Birchcliff Nursing Home*, [1975] OLRB Rep. Apr. 384.

9. Since the Metropolitan application was brought prior to the release of the interest arbitration award and since section 10(8) of HLDAA suggests a collective agreement (settled by arbitration) is not effective until "the date the board of arbitration gives its decision", the application is therefore untimely notwithstanding the fact that it was brought after the commencement of the last two months of the April 1, 1989 to March 31, 1991 term the parties had agreed to.

10. A similar argument is made in respect of the application at Grace. However, since this application was filed subsequent to the effective date of the collective agreement resulting from the arbitration award and since this award was released less than 90 days prior to the expiry of the two year period referred to in section 10(12) of the HLDAA, that section continues the operation of the collective agreement and delays the commencement of the open period to a date subsequent to the day on which the present application was filed.

11. SEIU also offers certain policy considerations in support of the legislative interpretation it advances. While open periods are recognized as legitimate opportunities for employees to effectively voice their opinion regarding maintaining an established bargaining agent, the HLDAA, like the Act, limits the availability of such periods. The policy underlying those limitations is to promote labour relations stability and to give employees a reasonable opportunity to evaluate the fruits of collective bargaining and, in particular, the performance of their bargaining agent.

12. Under the HLDAA, where strike and lockout sanctions are unavailable to the parties, collective agreements are established through interest arbitration once it is determined that a conciliation officer has been unable to effect a collective agreement (see section 4 of the HLDAA).

Though the process may be protracted, the resulting collective agreement is inevitable. In this context it would be unfair to subject an incumbent union to a displacement campaign before the collective agreement is finalized (as in the Metropolitan case) or before the union and employees are afforded a reasonable opportunity to present and digest its terms (in the Grace case).

13. Not surprisingly, IBEW takes a different view. While it accepts that section 12(2) and the Board's jurisprudence indicate that, once a conciliation officer is appointed and the collective agreement expires, no displacement application can be filed until the open period under the subsequent agreement, it argues that these applications were, in fact, made during that open period. In each case the application was filed during the last sixty days of what the parties had agreed would be the duration of the resulting collective agreement. In each case the board of arbitration adopted the duration agreed to by the parties (although in the Metropolitan case after the present application was filed). IBEW points to section 10(3) of the HLDAA and argues that once the parties agree upon a matter to be included in the collective agreement (including its duration) that matter is settled and the Board of Arbitration has no power to address the issue or to vary the parties' agreement. The cases before us are cases of first impression - we are asked to distinguish the cases relied upon by SEIU on the basis that in none of those cases was it disclosed that the parties had agreed on the term of the collective agreement or that the applications in question would have been timely within that agreed term.

14. Insofar as the application of section 10(12) is concerned, IBEW suggests that it ought not to apply in circumstances where the parties have agreed to the duration of the resulting agreement and consequently removed that issue from the purview of the interest arbitration.

15. While the legislation must balance industrial relations stability with the freedom of employees' choice, the purpose of certain HLDAA provisions, and in particular section 10(12), is to insure the open period is not lost. It would be contrary to that purpose to interpret the HLDAA in such a fashion as to preclude a displacement application during the last two months of what the parties agreed would be the term of the resulting collective agreement.

Decision

16. We begin with a cursory review of the scheme of the HLDAA with emphasis on effective dates and the duration of collective agreements.

17. Unless the parties agree on *all* the matters to be included in a collective agreement, the matters in dispute shall be decided by arbitration. Where the parties agree to all matters the resulting collective agreement is effective with the execution of their agreement (see section 10(1) of HLDAA). In other cases the collective agreement is effective the date the board of arbitration gives its decision (see section 10(8)). Thus, there is (again barring cases where the parties have agreed to *all* matters) no new collective agreement prior to the release of the award of the interest board of arbitration.

18. For convenience we again set out the provisions of subsections 10(10), 10(11) and 10(12) of HLDAA:

(10) Except where the parties agree to a longer term of operation, any document that constitutes a collective agreement between the parties shall remain in force for a period of one year from the effective date of the document.

(11) Notwithstanding the provisions of subsection (10) and except where the parties agree to a longer term of operation, a document that constitutes a collective agreement shall cease to operate on the expiry of a period of two years,

...

- (b) from the day upon which the previous collective agreement ceased to operate where notice was given under section 53 of the *Labour Relations Act*.

(12) Where under subsection (11), the period of two years has expired on or will expire within a period of less than ninety days from the date the board of arbitration gives its decision, the document that constitutes a collective agreement shall continue to operate for a period of ninety days from the date the board of arbitration gives its decision for the purposes of subsection 5(4), subsection 53(1) and subsection 57(2) of the *Labour Relations Act*.

19. The parties do not, however, have unfettered freedom to determine the duration of a collective agreement. Sections 10(10) and 10(11), unlike 10(12), do not distinguish between collective agreements determined by arbitration and those negotiated by the parties. In both cases (subject to the parties' agreement to a longer term) the collective agreement remains in force for a period of one year from the effective date but not beyond the two year period following the expiry of the previous agreement. In practical terms this provides a high degree of predictability regarding the duration of a collective agreement resulting from arbitration. Unless the award of the Board is made within one year of the expiry of the previous agreement (or unless the parties agree to a longer term), the resulting collective agreement will expire two years after the expiry of the prior agreement. This predictability is evident in the present cases - even if interest awards had been released on the very day of the interest arbitration hearings (November 16, 1990 at Metropolitan and July 24, 1990 at Grace), the application of section 10(11) would have resulted in a March 31, 1991 expiry date in both cases. This may well explain why the parties themselves agreed to a March 31, 1991 expiry date.

20. However, as in the present cases, it is not unusual for an interest award to be released close to or, indeed, more than two years after the expiry of the prior agreement. Absent any further legislative provisions one can imagine the virtual elimination of an open period resulting from the common delays associated with the interest arbitration process. Where an interest award was released subsequent to the expiry of the resulting agreement, the open period might well be limited to the period of time it would take to arrange the appointment of a conciliation officer. It is in this circumstance which section 10(12) comes into play. Where an award is issued after or within 90 days prior to the expiry date otherwise contemplated by subsection 11, the collective agreement continues to operate for a period of 90 days for the purposes of subsections 5(4) (displacement applications), 53(1) (notice to bargain), and 57(2) (termination applications). It is no accident that section 10(12) of the HLDAA not only refers explicitly to section 5(4) of the Act but also mirrors its language in directing that the agreement "shall continue to operate". This latter phrase is obviously intended to dovetail with section 5(4) which makes a displacement application timely "only after the commencement of the last two months of its operation."

21. Although subsection 10(12) is linked to the date of an arbitration award, subsection 10(11) referred to therein applies to a collective agreement whether negotiated or arbitrated. Thus, whether the duration of a collective agreement is otherwise the subject of the parties' agreement or determined by a board or by statute, it continues to operate for a period of 90 days in the circumstances and for the purposes contemplated by subsection 10(12).

22. The language of subsection 10(12) is extremely clear: where (excepting cases where the parties agree to a term longer than that contemplated by subsections 10(10) and 10(11)) an interest award is issued more than 2 years less 90 days after the expiry of the prior agreement, the resulting agreement continues to operate for a 90 day period for the purpose of, *inter alia*, displacement applications. This extension is by operation of law and supercedes the parties' agreement, the award of an interest arbitration board or the term which would otherwise result from the applica-

tion of subsections 10(10) and 10(11). (We note that this is not the first time the Board has ruled that the provisions of the HLDAA may prevail over the agreement of the parties or the award of an interest arbitrator in respect of the duration of a collective agreement - see *Local 865, International Union of Operating Engineers*, [1978] OLRB Rep. Mar. 326; *Hillsdale Nursing Home*, [1978] OLRB Rep. Jan. 11.)

23. Were it not for the clarity (if not elegance) of the statutory language, the parties' policy arguments might have been more significant in our deliberations. We are, however, fortified in our conclusions regarding the interpretation of the relevant HLDAA provisions when we consider those arguments. The HLDAA does indeed preserve the "open period" - while it may occur at a time different from that contemplated by the applicant, it is not lost. The advantage of the statutory scheme in cases like the present ones is that it provides employees with an opportunity to review and (at least for a short time) experience the benefits and liabilities of the collective agreement secured by their bargaining agent rather than asking them to make significant choices about their bargaining agent at a time when they have been waiting 2 years or more for the new collective agreement required under the HLDAA.

24. Neither are we satisfied that the interpretation advanced by the applicant has any significant advantages in respect of the predictability of the open period. While a third party contemplating a displacement application may be forgiven the sensation of trying to hit a moving target, the laws of its movement are quite clear - beginning at a certain and readily ascertainable point in time the open period, as contemplated by section 10(2) of the HLDAA, will be a direct function of the date of the arbitrator's award. There is no less certainty to that reference point than the ones which may be appropriate at other times in the process.

25. We return then to the particular facts of the present cases. In Metropolitan the application was filed subsequent to the expiry of the prior agreement and the appointment of a conciliation officer but prior to the release of the interest award. Is this application timely because it is filed during the last 60 days of the term agreed to by the parties (or indeed, the term resulting from the application of section 10(11) of the HLDAA)? We think not.

26. There is some accuracy but little attraction in Mr. Fishbein's argument that the cases relied upon by SEIU are distinguishable (but see *Bobier, supra* where the Board dismissed the application without a hearing pursuant to Rule 71 - although not explicit in the case, that application appears to have been brought during the last 2 months of the period contemplated by section 10(11)(a) of the HLDAA).

27. In our view section 12 of the HLDAA and the cases that have interpreted it clearly demonstrate that once the open period is closed by the appointment of a conciliation officer (and, in the case of a renewal, the expiry of the prior agreement) there can be no new open period before there is a new collective agreement. As the Board observed in *Nel-Gor, supra*, at para 5:

... The scheme of the Act [HLDAA], therefore, is designed to insure that the parties will have a collective agreement. If a termination [or, in our case, displacement] application could interrupt the process which is designed to ultimately establish a collective agreement between the parties, the scheme and purpose of the Act would be frustrated.

28. Thus, once the interest arbitration process is commenced it must be brought to its conclusion before an application under section 4(5) or 57(2) of the Act can be timely. Where that process is protracted the "loss" of an open period which "might have been" is remedied by section 10(12) of the HLDAA.

29. It was for these reasons that we ruled the application in Metropolitan untimely.

30. The application at Grace differs, for our purposes, only insofar as it was filed subsequent to the award of the interest board of arbitration. That award, however, was rendered on January 25, 1991. Since that date is less than 90 days before the second anniversary of the expiry of the prior agreement, section 10(12) of the HLDAA is operative and continues the operation of the resulting collective agreement for a period of 90 days from January 25, 1991. Consequently, the present application (filed on February 8, 1991) is not within the period contemplated by section 5(4) of the Act and is, therefore, untimely.

The Intervener's Request for a Bar

31. SEIU argues that the disruption caused by the applicant's untimely applications ought to lead the Board, pursuant to its discretion under section 103(2)(i) of the Act, to impose a bar with respect to any future applications by IBEW.

32. Referring us again to the policy reasons which, in its view, explain why the present applications are untimely under the HLDAA, SEIU asserts that rather than enjoying the period of stability and having the opportunity to receive and subsequently explain the terms of the new collective agreement to its members, it has been required to conduct an election campaign in response to the applicant's untimely applications. This loss is irreparable. In the circumstances the Board ought to exercise its discretion to impose a bar.

33. IBEW responds that the intervener's request is at odds with the Board's practice and jurisprudence regarding the imposition of a bar. There is, it asserts, no case where the Board has imposed a bar after dismissing an application (by way of pre-hearing or otherwise) as untimely.

34. Generally speaking the Board will impose a bar where an application is dismissed in accordance with the expression of employee wishes in a representation vote. Where leave to withdraw is sought after a vote has been directed the Board will issue the "caution" in accordance with the decision in *Mathias Ouellette*, [1955] CLLC para. 18,026 (see paragraph 7 of Practice Note No. 7). However, in *The Bristol Place Hotel*, [1979] OLRB Rep. June 486, a bar was imposed when a pre-hearing applicant sought leave to withdraw before the votes contained in a sealed ballot box were counted. In addition there may be other exceptional circumstances (generally tied to concerns about abuse of process) where the Board may impose a bar. The Board's approach is usefully summarized in *Sonora Cosmetics Inc.*, [1982] OLRB Rep. June 954 at paragraph 4:

In exercising its discretion under section 103, the Board has not been blind to practical (or tactical) realities of the situation. A certification proceeding may appear very straight-forward to an experienced labour law practitioner, familiar with the Board's rules policies, and jurisprudence, but to a layman or union official who does not regularly appear before the Board, the certification process may not seem so simple. In the Board's experience, *it is neither unusual nor particularly surprising that from time to time, certification applications have to be withdrawn, or are dismissed because they are not properly launched or supported in accordance with the Act or Rules. But this fact alone does not justify the imposition of a bar ...* Moreover, the Board is well aware of the potential effect on the momentum of the union's organizing campaign if employees who have joined a union and indicated their desire for collective bargaining are prohibited from realizing this goal for as much as ten months. Unless there are exceptional circumstances which warrant prohibiting employees from proceeding with their attempt to organize...the Board has been relatively lenient in imposing a bar under section 103.

[emphasis added]

35. Thus, it can be seen that, with the possible exception of *The Bristol Place Hotel* case, supra, the intervener's request does not fit squarely within the parameters of the Board's usual approach to the exercise of its discretion. In the latter case, however (as in paragraph 7 of Practice

Note No. 7), the concern underlying the Board's approach was to not allow the applicant to avoid the risk of defeat in a representation vote. We are satisfied that the applicant (who, of course, urged us to entertain the application and count the ballots) is not seeking to do that in the present case.

36. Finally, while there is undoubtedly some truth to the intervener's assertion that having had to participate in an unnecessary election campaign has caused it considerable disruption, we are not persuaded that that fact alone warrants the imposition of a bar. Even if we were otherwise attracted to that argument, the intervener's conduct in these proceedings would persuade us otherwise. Although SEIU asserted its timeliness objections from the outset, it repeatedly declined to respond to numerous requests from the applicant to provide the details of its position. Had it acceded to these requests (or, alternatively, had it advanced a vigorous early position that the applications ought to be dismissed on a preliminary basis prior to the holding of a representation vote) there would have been a greater possibility that the necessity of holding representation votes in these matters might have been avoided.

37. It was for all of the above reasons that, in our decision of April 8, 1991 we dismissed these applications and denied SEIU's request for a bar.

1500-88-R National Elevator & Escalator Association, Applicant v. International Union of Elevator Constructors and its Locals 50, 90 and 96, Respondents v. Canadian Elevator Contractors Association, Intervener

Accreditation - Construction Industry - Applicant seeking to be accredited as bargaining agent for certain employers in residential sector of construction industry - Membership evidence on behalf of 5 employers filed - Applicant challenging 6 of 13 employers named by unions on Schedule E - Applicant claiming, *inter alia*, that work performed by one employer was not elevator construction work and that 3 other employers were not engaged in construction work at any material time - Board rejecting 4 challenges and finding it unnecessary to deal with 2 others - Application dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *Ross Dunsmore*, *Patty J. Murry* and *Guy W. Giorno* for the applicant; *B. Chervcover*, *E. Shaw* and *P. Verrege* for the respondent unions; *Carl Peterson* for the intervener.

DECISION OF THE BOARD; April 22, 1991

1. The name of the applicant is amended to: "National Elevator & Escalator Association". The name of the respondents is amended to: "International Union of Elevator Constructors and its Local Unions 50, 90, and 96".

2. This is an application for accreditation within the meaning of sections 125 through 127 of the *Labour Relations Act*. The applicant seeks to be accredited as the bargaining agent for certain employers in the residential sector of the construction industry in the province of Ontario which have a bargaining relationship with the respondents.

3. Pursuant to Letters Patent issued on April 6, 1977, the applicant is an Ontario Corpora-

tion without share capital. The applicant's Letters Patent and by-laws authorize it to (among other things) act on behalf of its members in collective bargaining matters. The applicant's status or ability to bring this application was not challenged. On the basis of the material before the Board, and for the purposes of this decision, the Board finds the applicant to be an employers' organization within the meaning of section 117(d) of the *Labour Relations Act*, and, further, that it is a properly constituted organization of employers within the meaning and for the purposes of section 127(3) of the Act.

4. The respondents are four separate trade unions within the meaning of section 1(1)(p) and 117(f), and for the purposes of the *Labour Relations Act*. The three individual local unions are affiliated bargaining agents of the designated employee bargaining agency International Union of Elevator Constructors for purposes of collective bargaining in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. That designation applies only to the industrial, commercial and institutional sector, however. Further, it is doubtful that the respondents constitute a "council of trade unions" within the meaning of the Act (see the *Ontario Erectors Association*, [1971] OLRB Rep. Aug. 522). Nevertheless, for the purpose of this decision, we assume, without finding, that the four trade unions are appropriate respondents to this application.

5. The Board therefore assumes, for the purposes of this decision, that it has the jurisdiction to entertain this application.

6. The applicant filed the membership evidence on behalf of five employers. This evidence is in the form of identically worded individual letters. Each letter authorizes the applicant to represent the employer signing it as its bargaining agent and representative, and to bargain on its behalf with the respondents for a collective agreement pertaining to elevator construction in the residential sector of the construction industry in the Province of Ontario. Each letter also specifically supports this application. The applicant also filed a duly completed Form 88, Declaration Concerning Representation Documents Application For Accreditation, Construction Industry which attests the regularity and sufficiency of its documentary representation evidence. The Board is satisfied that the applicant's evidence of representation complies with the requirements of sections 102 and 120 of the Board's Rules of Procedure. The Board is also satisfied that each of the individual employers on behalf of which the applicant has submitted membership evidence has vested appropriate authority in the applicant to enable it to discharge the responsibilities and accredited bargaining agent.

7. At a hearing held on April 18, 1990 with respect to this application, before a differently (in part) constituted panel of the Board, the parties agreed that the bargaining unit of this application is appropriately described in terms of the residential sector in the Province of Ontario. On the basis of the material before the Board, and having regard to the agreement of the parties, and notwithstanding that the International Union of Elevator Constructors is designated to represent "Journeymen and Apprentice Elevator Constructors" represented by its affiliated bargaining agents in bargaining in the industrial, commercial and institutional sector the Board finds, *for the purposes of this decision*, that all employers of elevator and escalator mechanics and their helpers for whom the respondents have bargaining rights in the residential sector of the construction industry in the Province of Ontario, constitute a unit of employers appropriate for collective bargaining.

8. In accordance of the Board's Rules of Procedure, a notice of this application was sent to thirty-two employers. Of these, ten failed to file a Form 94, Employer Filing, Application For Accreditation, Construction Industry or a Schedule H list of employees as required by the Board's Rules of Procedure. At the hearing on April 18, 1990, the list of employers in the unit of employ-

ers on the date the application was made who had had, within the one year period prior to the date of application, employees for whom the respondents have bargaining rights engaged in elevator construction work in the residential sector of the construction industry in the Province of Ontario (section 127(1) - Schedule E) consisted of, on the face of the material before the Board, thirteen employers. Of these, the applicant asserted that eight (Adco Elevator Service Ltd. ("Adco"), Canadian Escalator and Elevator Service Co. Ltd. ("Canadian Elevator"), Miro Elevators Limited ("Miro"), York Elevators Limited ("York"), APV Canada Inc. ("APV"), Capital Elevator Co. Ltd. ("Capital"), Televator Corporation Limited ("Televator"), and Valley Elevator Co. Ltd. ("Valley")) should not be included on Schedule E.

9. At the joint request of the parties, the panel before which they appeared on April 18, 1990, authorized the Labour Relations Officer to inquire into and report to the Board with respect to, among other things, the list of employers on Schedule E and the applicant's challenges thereto.

10. Subsequently, the applicant conceded that two of the employers it had challenged (APV and Canadian Elevator) were properly included on the Schedule E list of employers for the purposes of section 127(1) of the Act.

11. The Officer designated to conduct inquiry authorized by the Board did so and prepared a report to the Board with respect thereto, which report included a transcript of the evidence adduced before him. A copy of the report was provided to counsel for the various participating parties and a hearing was convened to hear the representations of the parties with respect thereto.

12. It was common ground that if three or more of the applicant's remaining challenges to the list of employers on Schedule E failed, its application would, having regard to the provisions of section 127(2) of the Act, also fail.

13. The applicant submitted that the work performed by Capital during the material time was not elevator construction work; that for the purpose of this application Valley was part of Westinghouse Canada Inc. Elevator Division ("Westinghouse"), already an employer on Schedule E; that Adco, Miro and Televator were not engaged in construction work at any material time; and, finally, that Adco and Miro had no "employees" engaged in elevator construction work in the residential sector at any material time.

14. The applicant referred the Board to *Levert & Associates Contracting Inc.*, [1989] OLRB Rep. June 630, where, at paragraphs 12 to 15, the Board dealt with a question regarding whether certain work was in the construction industry or not as follows:

12. The Board has recognized a distinction between maintenance work and construction work since its decision in *Tops Marina Motor Hotel*, 64 CLLC ¶16,004, the first reported decision interpreting the definition of construction industry in what is now clause (f) of subsection 1(1) of the Act, even though the words maintenance or maintaining are not used in the definition or elsewhere in the Act. *The problem always is to make the distinction in a particular fact situation because there is no clear demarcation between maintenance work and construction and, in the Board's experience, what the parties see generally as being one or the other appears to be very much in the eye of the beholder.* See, for example, *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481, at paragraphs 46 and 47. *The Board, of course, must determine whether or not work characterized by a party as maintenance work is construction work for purposes of the Act, not for some more general purpose.* The Board's decision in *Master Insulators'*, *supra*, is the first reported decision which lends some definition to the task of distinguishing maintenance work which is not construction work from repair work which is.

13. The facts here are clear. The dissolving tank and the vapour pipe were functioning fully immediately prior to the shutdown. But, because they both had developed thin areas, it was decided, in the case of the tank, to reinforce those areas and, in the case of the pipe, to replace

it because that was more economical than patching or cutting out and replacing the thin areas. The work was not an addition to the recovery and steam plant and was not for the purpose of increasing its production capacity. It was work done for the purpose of avoiding having the tank or pipe fail while the mill was operating. Clearly, it was work which would assist in preserving the functioning of the recovery and steam plant and it was not work done for the purpose of restoring a system which had ceased to function or function economically.

14. These facts distinguish this case from *Inscan, supra*, on which the applicant relies, where fire damage at a refinery stopped production for three weeks of a feedstock for lubricating oils. That process represented approximately ten per cent of the total product capacity of the refinery. The facts herein are much more analogous to those in *Gallant Painting, supra*, on which the respondent relies. In that case the Board found that the painting of "...pipes, tanks and other containers...", amongst other things, in two petrochemical plants, was work which "...will preserve and protect the structures from corrosion and thereby extend their useful lives.". The patching of the tank and replacement of the vapour pipe served to extend the useful life of the recovery systems in the recovery and steam plant of the mill.

15. The fact that there were other contractors in the mill who may have been employing boilermakers pursuant to the boilermakers provincial agreement, an agreement which has application in the industrial, commercial and institutional sector of the construction industry, is of no assistance to the Board in this case. The question the Board must answer is whether the respondent was performing work in the construction industry and was an employer within the meaning of clause (c) of section 117 of the Act. That requires an analysis of the work which the respondent's employees were performing. There is no evidence that the work which they were doing had any connection whatsoever with the work being performed by the other contractors.

[emphasis added]

Counsel for the applicant urged the Board to conclude that insubstantial or "minor" work should not be characterized as construction work; that is, that not every correction of a malfunction in an elevator system constitutes construction work.

15. Section 1(1)(f) of the Act defines the construction industry broadly for labour relations purposes:

1.-(1) In this Act,

- (f) "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;

The Board's decision in the *Master Insulators Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477 is probably the one most often referred to in cases in which the Board must determine whether a particular kind of work is in the construction industry or not. At paragraphs 22 to 24 and 27 to 29 of that decision, the Board offered an analysis which has become the corner-stone of the jurisprudence on this question:

22. However, the Board, since the introduction of the construction industry provisions into the Act in 1962 in *The Labour Relations Amendment Act*, 1961-62, S.O. 1961-62, c.68, has regarded maintenance as not included in the definition of "construction industry" in section 1(1)(f). For example, in the *Tops Marina Motor Hotel*, case, 64 CLLC ¶16,004, an application for certification was held to be properly made under the construction industry provisions of the Act. In that case the Board, in determining an appropriate bargaining unit of carpenters and carpenters' apprentices, stated that it was not its intention to include in that bargaining unit carpenters who might subsequently be employed to do ordinary maintenance work once the motor hotel was in operation. In the *Dravo of Canada Ltd.* case, [1967] OLRB Rep. June 261, the Board distinguished between an employer's maintenance operations and its construction operations and in *The Board of Governors of The University of Western Ontario*, case, [1970] OLRB Rep. Oct.

776, the Board determined that the employer was not operating a business in the construction industry because the employees who were the subject of an application for certification were engaged in maintenance rather than repair. In the *Overhead Door Co. of Toronto Ltd.* case, [1974] OLRB Rep. July 482, the Board examined the business of an employer who was engaged in the sale, distribution, installation, maintenance and warranty of various types of wood and metal doors and concluded that whether “maintenance” is to be considered as part of “construction industry” depends on the type of “maintenance” being performed and on the context of a given employer’s operations.

23. The evidence before the Board established that insulators use the same tools, apply the same insulation and exercise the same skills whether the work is clearly new construction, which was agreed by all of the parties to be included within the definition of “construction industry” in section 1(1)(f) of the Act, or is described as either “maintenance” or “repair”. Indeed, the line of demarcation between “maintenance” and “repair” is not a sharp one. On more than one occasion witnesses who were unable to define either “maintenance” or “construction” expressed confidence that they knew “maintenance” and “construction” (and, therefore, “repair”) when they saw it.

24. Almost all of the work upon which this complaint is based involved applying insulation in order to maintain or sustain a system that was either producing or capable of producing a product according to its design. In some instances the system or portion of a system was actually functioning during the removal or application of insulation. In other instances a system or portion of a system was briefly closed down or advantage was taken of periodic or annual shut-downs in order to remove or apply insulation.

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27. The complainant referred to numerous legal authorities in its argument and its word by word analysis of section 1(1)(f). These authorities were drawn from many jurisdictions and concerned the interpretation of “constructing”, “altering”, “repairing”, “demolishing”, and “revamping” in contracts and legislation in a wide variety of contexts. However, the Board found none of these authorities to be persuasive. The authorities cited before the Board under scored [sic] the necessity of considering the context in which a word is used in order to interpret its meaning.

28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was an addition for the safety and comfort of Stelco’s employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. The rest of the work referred to in the complaint was, for the most part, clearly *work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and it to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility.* However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 1341a(1) of the Act.

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with either their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint “*maintenance*” is *difficult to distinguish from “repair”.* In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. “Maintenance” and “repair” are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situa-

tion where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

[emphasis added]

16. As is evident from the *Master Insulators*, *supra*, case and the Board's subsequent jurisprudence, there is no clear distinction between construction and non-construction work. It is particularly difficult to draw a distinction between "repair" work, which is construction work, and "maintenance" work, which is not (see, for example, *Levert & Associates Contracting Inc.*, *supra*, *Briecan Const. Limited*, [1989] OLRB Rep. May 417, *Inscan Contractors (Ontario) Inc.*, [1986] OLRB Rep. May 640, *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481, *Quinard Limited*, [1982] OLRB Rep. July 1054). Whether something is repair or maintenance work will depend upon the nature and purpose of the work in question in the context of the facility or system in or to which the work is being performed. Generally, work performed on existing equipment in an existing facility for the purpose of keeping the facility or a system in it operating properly before the facility or system has ceased to do so, is appropriately characterized as maintenance work. On the other hand, work involving the addition to or replacement of equipment for the purpose of either increasing the capacity of the facility or system, or restoring the ability of a facility or system to function properly, is appropriately characterized as repair work. The amount, apparent significance, or value of the work in question may be part of the context in which the assessment is properly made but are in no way determinative of the question. Similarly, whether a facility or system is shut down while the work in question is being performed may also be relevant, but will not be determinative.

17. It was not disputed that Capital and Valley were engaged in construction work in the residential sector of the construction industry in the province of Ontario during the material times. However, the applicant argued that Capital was not engaged in elevator construction work and that Valley provided only labour to another employer in the bargaining unit (Westinghouse), so that the latter was the true employer, not Valley. Accordingly, submitted the applicant, Capital and Valley should not be included on the list of employee in the bargaining unit for purposes of the determination which the Board must make under section 127(1) and (2) of the Act.

18. During the material times, Capital installed small lifts and elevators in private residences, replaced some water damaged elevator buffer channels in passenger elevators in a condominium building, and removed existing lighting and installed new lighting and drop ceilings in passenger elevators in another condominium building.

19. Section 1(g) of the *Elevating Devices Act* defines an "elevating device" as:

... a non-portable device for hoisting lowering or moving persons or freight, and includes an elevator, dumbwaiter, escalator, moving walk, manlift, passenger ropeway, incline lift, construction hoist, stage lift, platform lift and stairway lift as defined in the regulations;

Notwithstanding that the *Elevating Devices Act* does not apply to elevating devices in or in connection with private dwelling houses used exclusively by the occupants and their guests unless the owner of the device so requests (section 2(a)), it is clear that Capital was engaged in installing what are undoubtedly elevating devices. The fact that a particular elevating device is not regulated by the *Elevating Devices Act* does not mean either that it is not an elevating device or that the installing one is not elevator construction. On the contrary, we are satisfied that the installation of any elevating device constitutes elevator construction work within the meaning of the *Labour Relations Act* and for the purposes of this application. In addition, we are satisfied that replacing the water damaged buffer channels constituted a repair work and it was therefore construction work within

the meaning of the *Act*. We are therefore satisfied that Capital is properly included on the Schedule E list of employers.

20. In our view, the work done by Valley for Westinghouse was performed on a sub-contract basis. Westinghouse provided the elevator “materials” and Valley supplied the labour, tools and equipment to install them. The individuals who perform this elevator construction work were brought to the job site, supervised and paid by Valley, and we are satisfied that they were employees of Valley. We are also satisfied that Westinghouse exercised only that control over Valley which any general contractor exercises over a sub-contractor in the construction industry. We are therefore satisfied that Valley should also be included on the Schedule E list of employers.

21. The applicant argued that, during the material times, Televator was engaged in only minor maintenance work and that York’s work, although more extensive, was also maintenance.

22. Among other things, Televator replaced a door operator motor and belts, installed new safety edge switches, removed defective door locks and installed new ones, and replaced a governor tension wheel. This work was performed in the residential sector of the construction industry in the Province of Ontario during the material times. The respective elevators on which this work was performed could not be operated, either at all in the case of the first three examples, and not safely in the case of the last example. We are satisfied that this was repair work and that it constitutes elevator construction work for the purpose of this application. Televator therefore is properly included on the Schedule E list of employers as well.

23. Similarly, York should also be included on Schedule E. The work that it was engaged in during the material times in the residential sector of the construction industry in the Province of Ontario included dismantling and removing malfunctioning controllers and installing new programmable controllers, replacing old door operators and interlocks with new ones, installing new door equipment (including clutches, hanger rollers and hangers), replacing damaged safety edges and adding safety edges where there had not been any, replacing hoisting equipment (including some hoisting cables), replacing worm gear and adding safety retainer gibs on elevators which did not previously have them. In our view, this was construction work.

24. With the inclusion of Capital, Valley, Televator, and York, there are eleven employers on Schedule E. The applicant filed representation evidence with respect to only five of these employers. Having regard to the provisions of section 127(2) of the *Labour Relations Act*, its application can therefore not succeed. We therefore find it unnecessary to deal with the applicant’s challenges to Adco or Miro.

25. This application is dismissed.

2668-90-G Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. Ontario Precast Concrete Manufacturers Association, Respondent

Construction Industry - Construction Industry Grievance - Collective agreement providing for daily meal allowance where employees required to stay overnight - Parties disputing interpretation of provision and extent of entitlement - Board ruling that collective agreement providing for payment of meal allowance for each day the employee is away - Grievance allowed

BEFORE: *Nimal V. Dissanayake*, Vice-Chair, and Board Members *G. O. Shamanski* and *H. Kobryn*.

APPEARANCES: *A. M. Minsky*, *T. Connolly* and *L. Curto* for the applicant; *Bruce Binning* and *Bill O'Riordan* for the respondent.

DECISION OF THE BOARD; April 22, 1991

1. This is a referral of a grievance to arbitration under section 124 of the *Labour Relations Act*. The case was argued solely on the basis of the following agreed statement of fact, which was filed with the Board:

O.L.R.B. File No. 2668-90-G

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

Between:

**LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO
PROVINCIAL DISTRICT COUNCIL**

Applicant,

- and -

ONTARIO PRECAST CONCRETE MANUFACTURERS' ASSOCIATION

Respondent.

AGREED STATEMENT OF FACT

1. The parties have agreed to submit to arbitration the proper interpretation and application of Article 21.05 of the Provincial Agreement between the Ontario Precast Concrete Manufacturers' Association and Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council effective from May 1, 1990 until April 30, 1992 (the "Provincial Agreement"), which provides:

"Employees required to stay overnight shall receive a meal allowance of thirty dollars (\$30.00) per day for each day they are away and shall be provided with clean, adequate lodging. Effective May 1, 1991 this amount shall be increased to thirty-five dollars (\$35.00)".

2. The conduct by the employers bound by the Provincial Agreement which has been challenged by the Applicant in this grievance involves the non-payment of meal allowance by the said employers to their respective employees for each day which they are

working away from their home area and have been or will be, as the case may be, required to stay overnight. By way of examples, in the event an employee is working away all day Monday and is thus required to stay overnight on Monday and then works all day Tuesday and reports back to his home area on Tuesday night, he is paid one meal allowance of thirty dollars (\$30.00). By the same token, an employee who is required to work away all week from Monday to Friday and is thus required to stay overnight on each of Monday, Tuesday, Wednesday and Thursday nights and reports back to his home area on Friday night, is paid meal allowances for four of the days when he is required to work away. The Applicant's position is that an employee should be paid such meal allowance for each and every day he is away working and using the examples given, should be paid meal allowances on each of Monday and Tuesday when he works away on those two days and be paid meal allowances for each of the five days from Monday through Friday when he is away in the second example.

3. The parties have agreed that no reference will be made to past practice or to bargaining history.
4. The parties request that the Board remain seized of damages in this matter.

DATED at Toronto this 7th day of March, 1991.

"T. Connolly"
Labourers' International
Union of North America,
Ontario Provincial
District Council
Tom Connolly

"J. W. O'Riordan"
Ontario Precast Concrete
Manufacturers' Association
J. W. O'Riordan
President

2. The parties used the two examples listed at paragraph 2 of the agreed statement of fact to illustrate their submissions. There really is no material difference between the two examples. Therefore in addressing the submissions of counsel, the Board will limit itself to the example where the employee is required to work away, 7:30 a.m. to 4:30 p.m. on Monday, is required to stay overnight on Monday and then works 7:30 a.m. to 4:30 p.m. on Tuesday and returns home on Tuesday after work.

3. The parties obviously have different views on the employee's entitlement to a meal allowance under Article 21.05, which is set out at paragraph 1 of the agreed statement of fact. Counsel for the applicant submits that the triggering mechanism for the application of Article 21.05 is that the employee must be "required to stay overnight". Since this condition was satisfied in the example when the employee was required to stay overnight on Monday night, counsel argues that Article 21.05 entitled him to receive a meal allowance of thirty dollars per day "for each day he is away". Since he performed two shifts away from home base, he was "away" two days and was entitled to a meal allowance for each of Monday and Tuesday.

4. Counsel for the respondent contends that the entitlement to the meal allowance under Article 25.01 is qualified by the phrase "required to stay overnight". It is the respondent's position that, to be entitled to a meal allowance the employee must establish not only that he was required to stay overnight, but that as a result, he was not able to have his meals in the usual manner. Applying that interpretation to the circumstances of the employee in our example, counsel submits that since the employee was not required to stay overnight on Sunday night, on Monday he could have had his breakfast at home in the normal manner before leaving for work. He could also have taken a prepared lunch with him as usual. Therefore, there was no entitlement for breakfast or lunch on Monday. Counsel agrees that the employee was entitled to be paid a \$30.00 meal allowance to compensate for his dinner on Monday night, and his breakfast and lunch on Tuesday. According to counsel, since the employee was not required to stay overnight on Tuesday, after his shift ended at 4:30 p.m. on Tuesday, he was expected to get back home for dinner. It is the conten-

tion of counsel that the “day” in the phrase “thirty dollars per *day* for each *day*” in Article 25.01 in this employee’s case runs from 4:30 p.m. (his shift end) on Monday to 4:30 p.m. on Tuesday.

5. Both counsel urge upon us “a purposive” approach to contract interpretation. Both agree that, since there is no evidence as to past practice or bargaining history, the purpose and intent of Article 25.01 must be ascertained from the language used. Counsel for the applicant contends that once the precondition of a requirement to stay overnight is satisfied, the Article envisages payment of a meal allowance of \$30.00 per day for *each day* the employee is away. Counsel submits that this is a typical per diem payment, the intent being to pay a fixed amount per each day the employee works away regardless of where he had the meals, how much he spent, how many meals he had and even regardless of whether he had any meals at all. Counsel argues that if the respondent’s position is to prevail, the Board must read the phrase “for each *day* they are away”, as if it read “for each *night* they are away”. Counsel submits that the phrase “day” must be interpreted to mean “calendar day” or “work day”. He contends that there is nothing in the language of the Article which will justify an interpretation of “day” as meaning “night” or a 24-hour period from 4:30 p.m. to 4:30 p.m.

6. Counsel for the respondent submits that the intent of the Article is to reimburse the employee for meals which he could not provide for himself in the normal way because he was away. On Monday, the employee could have had his breakfast at home as he normally does when he is working at a site at his home base. Similarly, there was nothing to prevent him from taking his lunch with him as he normally would. Normally he would go home at the end of his shift at 4:30 p.m. and have dinner at home. He could have done the same on Tuesday even though he was working at a work site away from home. Counsel submits that to accept the Union’s interpretation is to provide a windfall for the employee in our example, as far as breakfast and lunch on Monday and dinner on Tuesday are concerned. Counsel contends that the parties could not have intended such a result. Counsel relied on two U.S. cases *Re BASF Wyandotte Corp.*, (1982) 78 L.A. 885 and *Re Celotex Corp.*, (1974) 62 L.A. 485 and urged the Board to find that Article 25.01 only envisaged reimbursement for meals which an employee could not have in the normal manner because he was working away.

7. Having carefully reviewed the language used by the parties and the submissions of counsel, the Board agrees with the applicant’s interpretation of Article 25.01. The theory presented by the respondent is predicated upon a series of factual assumptions, such as where an employee has his breakfast, how he provides himself his lunch, etc. While these assumptions may be true with respect to some employees, with regard to others it may not be so. How employees feed themselves can vary drastically from employee to employee. For that matter, it is quite conceivable that some employees do not have some meals at all, for example, breakfast or lunch. There is nothing in the language of Article 25.01 which enables the Board to infer a pattern of how an employee “usually” has his meals. Nor is there any evidence on that issue.

8. Besides, the language in Article 25.01 totally ignores the issues of the number of meals per day or how or where or even whether any particular meal is taken by an employee. If the Article provided for reimbursement for particular meals or a specified number of meals, such as so much for breakfast, so much for lunch and so much for dinner, the respondent’s argument would have had merit. However, the parties in their wisdom have elected to ignore all these variables by stipulating a flat rate per diem. Thus, even if we had evidence as to where and how many meals a particular employee usually had, that can have no bearing on the entitlement to a per diem meal allowance. That is the distinguishing feature of this case as compared to the two cases relied on by the respondent. In both *BASF Wyandotte*, (*supra*), and *Celotex*, (*supra*), the collective agreement provisions envisaged either a particular free meal or an allowance in lieu of a particular meal. It

was a payment *per meal* as opposed to a payment *per day* as is the case here. Therefore, the arbitrator drew an inference that the parties intended the entitlement to arise only where the employee was prevented from having that particular meal in the normal manner.

9. On the basis of the language in Article 25.01, we have concluded that where an employee is required to stay overnight, he is entitled to a per diem meal allowance of \$30.00 for each day he is away, regardless of his normal eating pattern. The "day" is the work day, which means he must be working a shift or part of a shift away from home base. In the example, since he qualified by being required to stay overnight on Monday, he is entitled to a meal allowance for each day he was away, namely Monday and Tuesday. In the second example, since that employee was away five days, Monday to Friday inclusive, he would be entitled to a meal allowance for each of the five days.

10. Having interpreted the disputed provision, as agreed upon by the parties, the Board remains seized in the event the parties cannot agree upon the issue of damages.

1868-89-R Amalgamated Transit Union Local 616, Applicant v. Transit Windsor, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Employee - Inspectors found to be exercising managerial functions in 1979 Board decision - Inspector and dispatcher classifications amalgamated into Operations Supervisor classification in 1981 - Operations Supervisors monitoring day to day operations of bus service - Union applying for certification of "tag end" unit including, *inter alia*, Operations Supervisors - Operations Supervisors first line of management - Since Board's 1979 decision, nothing changing in supervisors' duties indicating reason for exclusion having ceased to exist - Board excluding Operations Supervisors from bargaining unit sought by Union

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. W. Pirrie and B. L. Armstrong.

APPEARANCES: Paul Falzone, Ronald Seguin, Norm Morgan, Paul Lauzon and Gary Brown for the applicant; Patrick Milloy, Robert W. Coghill and Stephen Harrison for the respondent; Kenneth A. McLaughlin as an intervener.

DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER R. W. PIRRIE: April 23, 1991

1. This is the continuation of an application for certification. The only question dealt with in this decision is whether or not the persons classified as Operations Supervisors exercise managerial functions and thus should be excluded from the bargaining unit sought by the Union. Four Operations Supervisors were examined, and reply witnesses called, before a Board Officer. A hearing was held to hear submissions from all parties. Written submissions were also received from the union prior to the hearing.

2. Operations Supervisors are employed by Transit Windsor to monitor the day-to-day operation of its bus service. Ten of them supervise the 167 Operators who drive buses in and around the City of Windsor who have been covered by a collective agreement between the parties for over 50 years. The supervisors themselves do no regular bus driving work. Prior to 1981, the

people performing the supervisory functions were called Inspectors. At that time there was also a classification known as Dispatcher. Those two classifications were the subject of an application under section 95 [now section 106(2)] at a time when the Inspectors and Dispatchers were considered to be covered by the Operators' collective agreement for the purpose of wages, benefits and dismissal only. In a decision of the Board, *Transit Windsor*, [1979] OLRB Rep. March 262, the inspectors were held to be exercising managerial functions, the dispatchers not. In or around 1981, the two classifications were amalgamated into the classification now in dispute, Operations Supervisor. This issue arises in the context of an application for certification for a "tag end" bargaining unit comprised of the Operations Supervisors and various other employees. Management challenges their inclusion in the bargaining unit.

3. It is common ground that the Operations Supervisors are relied on by management to see that the bus service functions smoothly. This means making sure there are always drivers for the buses and that the buses are running the right routes and on time, to mention only the most obvious and basic facets of the job. The union does not dispute that the Operations Supervisors spend the great majority of their time supervising. The dispute, in its simplest form, is whether they just manage buses, or whether they also manage people to a sufficient degree to warrant exclusion from the bargaining unit. Article 14 of the collective agreement is illustrative of the problem, with its emphasis on service rather than personnel:

Every Operator shall obey the order of the Operations Supervisors, so that the service shall not be in any way held up. Such orders are subject to the provisions of the Occupational Health and Safety Act, 1978. If an Operator is entitled to a grievance by reason of such order, he shall not discuss it with the Operations Supervisor giving the order, but shall take it up later with his Grievance Committee.

4. The Board does not automatically exclude supervisory personnel from collective bargaining. In order to be said to involve the exercise of managerial functions, the supervisory function must also include effective control over the employment relationship of others. The Board looks at the tasks performed by supervisory employees to see, in the context of the particular enterprise involved, if the person exercises control, or the power of effective recommendation, in what have been called "areas of fundamental importance to the economic lives of employees". These include, among others, participation in hiring, firing, discipline of employees, input into general performance evaluation, participation in the grievance procedure and ability to give time off and assign overtime. The Board looks for the authority to make decisions which may impact adversely on an employee's wages, benefits or job security since those are the areas in which the true conflict of interest that the *Act* seeks to avoid may be found. See, among others *Hydro-Electric Commission of the Borough of Etobicoke*, [1981] OLRB Rep. January 38 and *Oakwood Park Lodge*, [1982] OLRB Rep. January 84, upheld 83 C.L.L.C. ¶14,016 (Ont. Div. Ct.) and the cases cited therein.

5. In decisions such as *Oakwood Park Lodge*, *supra*, and *Essex Health Association*, [1970] OLRB Rep. Nov. 824, the fact that information was passed on by the supervisory person for action by someone else, including disciplinary action, resulted in a finding that the persons involved were not exercising managerial authority. In those cases, a distinction was made between directions and reporting which are part of the exercise of professional skills and those which are truly to be considered managerial. Minor admonitions, information collection and reporting behaviour without recommendation for discipline were not considered to be managerial functions. In *Oakwood Park Lodge*, *supra*, the Board pointed out in relevant part:

... Persons who exercise skills which have been acquired through years of training or experience ... will have a special place on the "team" and will have a role to play in coordinating and directing the work of other employees - but this does not mean that they exercise managerial func-

tions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining... The focus should be upon those functions which have a direct and provable impact (positive or negative) upon the terms and conditions of employment of the alleged subordinate employees.

Otherwise, the *Act* would be inapplicable to thousands of skilled or professional employees. There was no evidence that the Operations Supervisors have any particular professional or technical qualifications different from the Operators, but they possess skills gained through years of experience in the transit system and they occupy at least a leadership position in the transit system. Giving the Operations Supervisors bargaining rights would not in anyway denigrate their skill, experience or stature, but their inclusion is not an option open to the Board if they exercise management functions.

6. As noted in a number of decisions, the line between employees and management is not always easy to draw. This is particularly so when authority which has ostensibly been granted has not been exercised at all, or has been exercised infrequently or inconsistently by people in a classification. To state the obvious, either end of the spectrum is easier to identify than the area in between. As the Board said in *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. April 261 at paragraphs 38 and 39 when discussing the concept of "effective control":

38. It is noteworthy that this test, so not to be overly exclusionary, requires that a person be *primarily* employed in the direction and supervision of employees and, as well, possess effective control or authority over those employees....

39. But the "effective control" test has not been an easy concept to apply. When can it be said that one person exercises effective control over another? One who can discipline, discharge, transfer, promote, or demote another employee surely has such effective control. And with a similar certainty one who only incidentally supervises, instructs, reports, etc. does not. But between these extremes there is a vast penumbral area. In this shadowland a person may exercise only one or two managerial type functions or make recommendations that other decision-makers consider. Thus it is in this area that the Board has most often said it will look at the "totality" of the evidence in making its determination....

We will review the evidence, in a summary form, with these considerations in mind. Argument of the parties will be referred to as necessary.

7. The Operations Supervisors report to Greg Seguin, the Transportation Coordinator, and on occasion replace him in his absence. Mr. Greg Seguin in turn reports to Robert Goody, the Manager of Operations for the Transportation Department who in turn reports to the General Manager of Transit Windsor, Robert Coghill. Thus, there are three managerial positions above the Operations Supervisors.

8. The Operations Supervisors are not involved in hiring employees. Their opinion may be sought on the performance of a probationary employee when others are deciding whether or not he or she should be made permanent. However, there was no evidence of the frequency of reliance on such opinions when rendered. Thus the Board cannot find that there was a power of effective recommendation at the stage of making an employee permanent. There was no evidence that an Operations Supervisor had ever fired anyone, or effectively recommended a firing. Mr. McLaughlin testified he had the power to fire by recommendation. However, he had never exercised this power and none of the others examined expressed the same view. Thus, in the two areas of hiring and firing, we conclude that the Operations Supervisors do not exercise managerial functions.

9. The area of disciplinary powers is crucial to the status of the Operations Supervisors, and will therefore be dealt with in some detail. This area is also one of the most difficult to deal

with in this case, for a number of reasons. One of these flows from what was referred to in the evidence as “management style”. It is clear that as a result of both the individual approach of some of the Operations Supervisors, and as part of an effort by upper management since the mid 1980’s to improve the relationship with the union, there is apt to be more “coaching” and problem solving than actual discipline from the Operations Supervisors towards the Operators. As well, the evidence indicated the Operators are not generally in need of a lot of discipline; for the most part they know their jobs and perform them appropriately. In addition, the Operations Supervisors’ own view of their powers, as represented by the four individuals examined, ranges over a considerable spectrum.

10. The job description does not mention discipline per se. However under the heading “ON-STREET SUPERVISION & MONITORING OF SERVICE”, it gives the following areas of responsibility relevant to the discipline function:

- To maintain schedule adherence on all routes...
- To ensure adherence by Operators of Transit Windsor rules & regulations.
- ...
- To provide all appropriate information for updating of operator records (e.g., operator infraction sheet).

11. The evidence dealt with three categories of discipline: warnings, letters and suspensions. It is not in dispute that the Operations Supervisors regularly tell Operators what they should or should not be doing. Warnings, which are recorded, are given fairly frequently, depending on the individual Operations Supervisor. The parties differ as to whether these documented verbal admonishments given to Operators for “infractions” such as running a bit ahead of schedule or not wearing ties (to give just two examples), constitute discipline or not. The Operations Supervisors are responsible for keeping track of these matters and, according to steps provided in the collective agreement, trigger action that is undeniably disciplinary if they accumulate to the requisite degree. The union takes the position that the Operations Supervisors’ role in this area is a conduit function in enforcing predetermined management rules, and should not be considered managerial.

12. Beginning in the spring of 1989, Kenneth McLaughlin, an Operations Supervisor, was involved in a special project intended to bring more consistency and fairness into the use of discipline by Operations Supervisors. This project, which Mr. McLaughlin described as simply one in a series of attempts to improve the disciplinary process, resulted in the adoption of a “Block System” whereby each Operations Supervisor is responsible for monitoring the work record of a block of Operators. The evidence supports a finding that this was a formalization of the function always performed by the Operations Supervisors. It was intended to promote consistency and accountability, and was not a new departure or additional responsibility. There are penalties, expressed as up to a certain number of days suspension for various thresholds of the most common offences set out in the collective agreement, and the guidelines to the Operations Supervisors issued with the Block System indicate that a number (left blank) of infractions requires a letter of discipline, and a certain number more, a suspension. The flow chart put into evidence indicates that the Operations Supervisor makes the decision and initiates the disciplinary action, while keeping the Transportation Coordinator informed.

13. Some of the Operations Supervisors had authored letters of discipline and held meetings with employees about them. Mr. McLaughlin believed he had the authority to issue letters of discipline without consultation, but had apparently not issued letters other than the disputed warnings referred to above. Union counsel asked Brian Wilkinson, the Operations Supervisor whose

evidence the union asked us to prefer to that of Mr. McLaughlin's, the question, "...can you on your own authority take disciplinary action against an employee other than a verbal reprimand?" He replied that through the block system he could. He later gave detailed evidence of a disciplinary letter and the meeting with a union representative which preceded it. Although this incident, referred to as the "Hocevar incident" occurred well after the application was filed, both parties referred to it in argument, and the evidence was not objected to when it went in. It is worth setting out in some detail. Mr. Wilkinson mentioned in advance to his superior that Mr. Hocevar had accumulated a number of infractions. Mr. Seguin agreed that it was time for a meeting and mentioned that it "looked like a suspension." Mr. Wilkinson's response was that it could be and that it would have to be looked into. As a result of conversations with the employee and a union representative, Mr. Wilkinson determined that a suspension was not warranted under the terms of the collective agreement. After the meeting, which was his first, Mr. Wilkinson went upstairs and "happened" to see Mr. Goody in the absence of Greg Seguin. He told Mr. Goody his conclusions as a result of the meeting and Mr. Goody agreed with him. There was no evidence that Mr. Goody considered overruling Mr. Wilkinson. Mr. Wilkinson issued a letter to Mr. Hocevar expressly stating that it constituted the first level of discipline and that further problems could lead to more serious action. The union does not see this as independent disciplinary action on Mr. Wilkinson's part. Rather it says he was playing a fact-finding role and implementing Mr. Seguin's and Mr. Goody's decision.

14. There were few instances of suspensions by Operations Supervisors in evidence, although each of the four examined had been told that they had the power to suspend. Two of the four had never suspended an Operator. The third said he "sent an Operator home" for suspected drug abuse, but did not appear to see this as a suspension. The fourth testified he had suspended the Union President on the day this application was made and that he had sent another employee home about two years ago for insubordination. Mr. Harrison, now Director of Human Resources, testified that he had issued suspensions during his tenure as an Operations Supervisor.

15. In the suspension of Ron Seguin, the only suspension about which the Board heard any detail, Mr. McLaughlin relieved Mr. Seguin, the Union President, of duty until he got back to him, for an infraction that was part of an ongoing dispute between the union and the employer. Mr. Seguin had previously been issued a notice of infraction for the same behaviour and was accordingly completely conscious that the next time he did it, he would be suspended. As well, the matter had been the subject of prior discussion with the Operations Supervisors and Greg Seguin and it seems it was common knowledge that the suspension was coming. Before Mr. McLaughlin got back to Ron Seguin, Greg Seguin, Mr. McLaughlin's superior, told Ron Seguin how long the suspension would be. Mr. McLaughlin was not part of this meeting, nor was he informed in advance of what was planned as to the length of the suspension. The following morning, a letter of suspension was given to Mr. Ron Seguin, signed by Mr. McLaughlin. In this situation, the union says that Mr. McLaughlin exercised no independent judgement, but merely acted as a conduit for upper management and did not participate in a way that amounts to effective recommendation. The employer takes the position that this was not a conduit function, and is beyond effective recommendation. It submits it was an independent decision to suspend on Mr. McLaughlin's part made without consultation.

16. As can be seen from the above, even where discipline is ostensibly meted out by Operations Supervisors, the Union takes the position that they serve only a conduit role from upper management, and cannot be said to be exercising any actual control. The Union describes them as collecting information for decision by their superiors, or implementing tightly controlled guidelines issued from above. As support for this they point to the fact that the Operations Supervisors are not involved in the formal grievance procedure, except occasionally as witnesses, although an

aggrieved employee may discuss the matter with an Operations Supervisor in an attempt to resolve a dispute informally. Article 4.03 of the collective agreement provides that "a designated management person, but not the Supervisor who initiated the charge against the grievor" shall conduct Step One of the grievance procedure. Article 4.01 provides that "an employee's complaint shall not be received as a grievance until the first line supervisor has had an opportunity to adjust the complaint." A union representative is permitted at that stage. The evidence is clear that the "first line supervisor" is considered to be the Operations Supervisor.

17. The Operations Supervisors, like the Inspectors before them, have access to the Operators' personnel files, but not their medical records. These personnel files contain the written records of admonishments to the various Operators which the union claims are not disciplinary. Due to this opinion, the union asked the employer in the fall of 1989 to change the heading of these documents from "verbal discipline" to "notice of infraction", which was subsequently done. However, in a step that tends in the opposite direction, copies of all such documents are now sent to the union, because of a provision of the collective agreement which provides that the union will be immediately notified in writing when an employee is dismissed, suspended or otherwise penalized (Article 3.02).

18. On the question of employee evaluations, the evidence fell far short of establishing that the Operations Supervisors' role had the potential of negative impact on the Operators' employment. The Training and Safety Officer, who the union has agreed is managerial, often consults the Operations Supervisors as a group about employee evaluations, and the Operations Supervisors do them themselves on an irregular basis. However, there was no evidence of reliance on the evaluations for any particular purpose on any regular basis, although the impression was left that the evaluations were part of an employee's file.

19. The Operations Supervisors have regular meetings at which policy matters, performance of Operators and suggestions for improvements may be discussed. These are not decision making meetings in any managerial sense. The Operations Supervisors are paid a salary rather than on an hourly basis. However, they are also eligible for overtime. Their benefits are also slightly different, apparently better, than the Operators. Nothing turns on these distinctions in working conditions in all the circumstances of this case.

20. The Operations Supervisors have keys to management areas of the system's facilities, which Operators do not normally have. They are also the only supervision actually at work after 4:30 p.m. The service runs to some extent around the clock, although the wee hours of the morning are quiet. The Operations Supervisors have the residence phone number of their superior, however. From this the union infers that they are not exercising independent authority at any time.

21. The Operations Supervisors keep track of the Operators' time by signing the daily schedule sheet. They authorize overtime and dispatch work when the regular schedule cannot be adhered to for reasons of absence, sickness or unexpected occurrences. They can grant time off up to a day. They submit a daily report to the Transportation Coordinator on how the shift went, including information on problems with Operators. The regular scheduling of the Operators is done by a person admitted to be managerial and a representative of the union and allocated through a sign-up procedure on the basis of seniority.

22. The Operations Supervisors have no budget authority to speak of, although they can and sometimes do make suggestions. Effects of their decisions about certain matters, like the location of bus stops, may also have budgetary implications, but these are subject to the approval of the Board of Directors. The evidence is clear that no managerial authority is exercised in financial matters by the Operations Supervisors. The same is true of policy matters in general; their opinion

is sometimes sought or given, but the evidence does not support a true managerial function in this area.

23. Except in their role “on the street” giving directions and enforcing rules and in the dispatch room rescheduling or giving time off, the Operations Supervisors do not speak officially for management. Thus, they are not present at grievance or Joint Union Management Committee meetings as representatives of management.

24. The issue of the ratio of management to bargaining unit employees has been raised in a number of cases in the Board’s jurisprudence, including *Transit Windsor, supra*. In that decision the Board held that it could not accept the idea that the large number of Operators (150 at the time) were entirely autonomous, or were “managed” entirely by two or three employees who work in the office. At the time of the examinations before us there were apparently ten Operations Supervisors and approximately 167 Operators.

25. The employer takes the position that the issue of the status of the Operating Supervisors was settled in the 1979 decision of the Board relating to Inspectors. Since then, the union has never asked that the Operations Supervisors be considered part of the current bargaining unit. Whether looked at afresh, or on the basis that the union has a heavy evidentiary onus because of the history of the position, employer counsel argues that the Operations Supervisors must continue to be excluded. Employer counsel argues that if anything has changed since 1979 it is that the managerial character of the Operations Supervisors has been more entrenched and the system more formalized. Counsel refers to *Dominion Stores Limited*, [1983] OLRB Rep. Dec. 2006 for the proposition that the status quo has great weight and compelling evidence is needed to lead the Board to the contrary conclusion.

26. The evidence of changes from the Inspectors’ job to the present shows few areas of change, and none of dramatic change. The most obvious of the changes is the merger of the Dispatcher position with the Inspector position and the title change to Operations Supervisor. There was no evidence to warrant a conclusion that the effect of the influx of Dispatcher duties diluted the authority in the Inspector portion of the job to any meaningful extent. There was evidence that the evaluation process changes from time to time although it was unclear when and to what extent. However, there was no evidence that it ever had managerial significance for the Operations Supervisors. Thus, nothing turns on this aspect. The position of Safety and Training officer, acknowledged to be managerial by the union was created approximately two and a half years ago. The people occupying this position now make the decision as to whether there was anything that could have been done by the Operator to prevent an accident. If so, it is a “chargeable” incident with minor negative financial consequences. To the extent this is a removal of managerial authority from the Operations Supervisor it is a relevant consideration but the parties did not address this point. Operations Supervisors maintain a prominent role in investigating accidents and dealing with their effects on service.

27. The other change potentially relevant to this application is the introduction of the Block System of discipline. This was officially introduced after this application for certification but was “in the works” according to Mr. McLaughlin at the time of a similar application for certification made in June, 1990, which was later withdrawn. The union argues that this system should be viewed in the light of the timing of its formal introduction, as well as its formal initiation after the date of the prior certification application which might suggest some relation to the previous application for certification. In the alternative it argues that the system further dilutes any independent decision making power the Operations Supervisors may ever have had. Further, the union argues that Mr. McLaughlin’s role in the area of discipline must be viewed in light of his overt opposition

to unionization of the Operations Supervisors and a resultant tendency to make much of the limited powers given by management.

28. In argument Mr. Milloy emphasized the employer's position that although the Operations Supervisors are not the highest level of management and are not running Transit Windsor, they do exercise managerial authority. There are guidelines imposed on them by persons to whom they report. The system runs because of the way it is set up. It is not a plant situation where the supervision of the foremen themselves is tight. However, it is submitted that these ten individuals, who are a hundred percent supervisory, direct and control the work force. We are asked to conclude that the Operations Supervisors have disciplinary power including warnings and suspensions, access to personnel files, responsibility to monitor certain groups of employees, and direction and control of the work force in their power to authorize overtime and excuse absences. They evaluate employees, meet together in private to discuss employees. They are the highest level of management at Transit Windsor after 4:30 pm. Further he asked the question "does this organization need a front line level of management free from conflict of interest", to which he suggests that the obvious answer is yes. Mr. Milloy asserts that it would be impossible for the Transportation Coordinator and the General Manager to do the functions done by the Operations Supervisors. Two managers would be physically incapable of supervising the hundred and sixty-seven drivers across the whole City of Windsor. Counsel contrasts this situation to that of *Breweries Warehousing Co. Ltd.*, [1981] OLRB Rep. Nov. 1545 where a group of employees who did sixty percent bargaining unit work were still excluded from the bargaining unit. He argues that Operations Supervisors are a hundred percent managerial and should be excluded more easily.

29. Mr. McLaughlin submitted that a decision that the Operations Supervisors were not managerial would make them non-existent as they would be reduced to the status of clerks. He emphasized his view that the evidence before us showed that the Operations Supervisors are managerial.

30. On behalf of the union, Mr. Falzone framed the issue differently. He argues that the most important fact is that individuals have expressed the desire to organize themselves collectively and bargain with the employer and that this desire should not lightly be refused. The union acknowledges that there is some conflict of interest between the Operations Supervisors and the Operators. Counsel submits that the more relevant question is what constitutes the appropriate response to that situation. Referring to the Board's 1979 decision excluding the Inspectors, counsel submits that in 1979 the only option was having them in or out of the bargaining unit. With the evolution of the jurisprudence the Board could determine that they should be in their own bargaining unit with their own Local to control their fate in bargaining. We could decide that there is not a community of interest with the rest of the tag end and design a separate bargaining unit for the Operations Supervisors.

31. Counsel contrasted the current facts with those noted in the Board's 1979 decision. He gives the example of the Board's finding that the Inspectors were self directed in that they design their own shifts. Now management determines their shifts as evidenced by a recent issue over whether the Operations Supervisors would be required to rotate through midnight shifts. It is the union's position that management is taking a greater role in how the Operations Supervisors work. The Board noted at paragraph 10 of that decision that the exercise of independent management authority by the first line supervisors was not only limited, but largely unnecessary. That situation has not changed.

32. The union also stresses that there is an enormous amount of autonomy in the drivers. Counsel asserts that Operations Supervisors supervise the operations, not the Operators. Their

fundamental duty is to make the operation work and to deal with unforeseen events. They take action to keep the system running. It is submitted that that is the thrust of the evidence, not that they exercise managerial authority over the drivers.

33. The union maintains that the verbal reports that were relied on by management are not disciplinary, but rather written confirmation of directions given. The fact that the Operations Supervisors have never been involved in the first step of the grievance procedure shows that they are not really involved in the discipline process in the union's submission. If they are involved at all it is as witnesses, not as managerial persons answering the grievance. The creation of the block system reduces any individual management discretion they had and is very mechanistic in approach. Counsel submits the Operations Supervisors exercise no power of effective recommendation for hiring, discipline, or termination.

34. Mr. Milloy replies, for the employer, that the desire of the individuals to bargain collectively is irrelevant to the issue under section 1(3)(b). The Board only has authority to look at their functions and exclude them if they are managerial.

35. Having considered the submissions of the parties and the evidence in its totality, the Board is of the opinion that the Operations Supervisors exercise managerial functions and should be excluded pursuant to section 1(3)(b). We are persuaded that the combination of the prominence of their supervisory function and their role in the disciplinary process, however it is labelled, create the kind of conflict of interest which the Act requires be avoided. The role of the Operations Supervisors in giving warnings, whether they are technically disciplinary or not in the sense given to that term by the arbitral jurisprudence, is neither minor, nor infrequent. Well before this dispute arose, one of the Operations Supervisors had issued 50 such warnings in a period of approximately 18 months. Another issued one approximately once a month. When and if to "write up" an operator is within the supervisor's discretion. It follows earlier reminders on the supervisors' part. When and if to send an employee home is a judgement for the Operations Supervisor to make on the spot. The rules which the supervisors enforce are well established, and partially agreed to in the collective agreement. However, this does not make the negative effects which flow from their enforcement any less tangible. The Operations Supervisors are too regularly and too centrally involved in this process to warrant the conclusion that they are merely delivering decisions made elsewhere or that it is a function incidental to other duties. It is clear that as discipline gets more serious, the supervisors' consultation with upper management increases, and the Seguin suspension can be construed as a situation in which Mr. McLaughlin did not actually impose the discipline himself. However, we are persuaded that the role in the earlier stages of the rule enforcement process, even without the initiating role for suspensions, warrants the Supervisors' exclusion.

36. We agree with the union that the legislation should be interpreted purposefully and in a spirit of extending collective bargaining where possible. We have carefully considered this issue in the context of the desires of the employees to bargain collectively and the proposal made of creating a separate bargaining unit for the Operations Supervisors. On the facts of this case we do not see that route as open to us. Here, we are of the view that the Operations Supervisors are not like the foremen in *Hydro-Electric Commission of Etobicoke*, [1981] OLRB Rep. January 38 whose functions were found not to be truly managerial. The factual differences may be ones of degree, but are crucial. None of the foremen had ever sent anyone home; some had not been told they had the authority. Only one had ever formally reprimanded an employee. They were required to deliver discipline even if they disagreed with it or had not given the warning themselves. In addition, there were five levels of authority between the foremen and the Commission itself and they performed a significant amount of bargaining unit work.

37. As to the issue of changes since the Board's 1979 decision, we are of the view that nothing has changed in the duties of the supervisors (Inspectors then, Operations Supervisors now) which indicates that the reason for their exclusion has ceased to exist. Then as now, it is clear that on a daily basis it is the supervisors who are the first line of management. They have considerable scope to negatively or positively affect the future of an employee with the company, the crux of the conflict of interest addressed by section 1(3)(b). It is clear from the Board's decision at that time, that the supervisors are at the very lowest level of management, and that the evidence before them, as before us, was by no means unequivocal. However, when the weight of the status quo is added to the balance, we see additional reason to leave the supervisors where they have been for the last twelve years.

DECISION OF BOARD MEMBER BROMLEY L. ARMSTRONG: April 23, 1991

1. I have read the decision of the majority of the Board and with respect I cannot agree.
2. As stated in *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84, at paragraph 7:

The purpose of section 1(3)(b) is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or members of the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor the employer and its management team, need to be concerned that its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in, *Corporation of the District of Burnaby*, [1974] 1 Can. LRBR 1 at page 3:

• • •

(the employer) wants to have the undivided loyalty of its senior people who are responsible for seeking that the work gets done and terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification in activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

In paragraph 8, the Board stated:

... In the case of so-called "first line" managerial employees, an important question is the extent to which they make decision which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is clearly incompatible with participation in trade union activities as an ordinary member of the bargaining unit....

3. In *Peterborough Civic Hospital Hospital*, [1973] OLRB Rep. Mar. 154, the Board examined the question as to whether or not a head nurse was an employee within the meaning of the Act. At paragraph 12, the Board stated:

Also, the head nurse forms a conduit between the general staff on her floor and management, or to put it another way she has a reporting function. In this function she is a liaison between management and other employees; she enables management to "keep its ears to the ground" and in touch with the daily operations and functions of the hospital, and at the same time she is a part of the vehicle for management to convey policies and decisions to other employees. Again, this reporting function should not be confused with the exercise of managerial duties. The duty to manage and the concept of a managerial function requires a corresponding and correlative responsibility. The head nurse in this case does not have that type of responsibility that one envisions as being managerial. She is not akin to the early foreman that we have spoken about, nor does she have duties that are incompatible with placing her in the bargaining unit. There is no conflict between the duty she owes to management and her being a member of the bargaining unit.... For example, if an employee wants time off in excess of one hour the head nurse must consult her supervisor. Sure, if she were management she would have a greater hand in awarding time off. The type of limited responsibility permeates other areas as well and in our view her lack of responsibility indicates that she is not part of the management team.

4. The only real issue in this case is the effect of the so called disciplinary powers of the Operations Supervisors. It is not disputed the Operations Supervisors do issue verbal and written warnings to the operators when they commit "infractions". Indeed, part of their job description of the Operations Supervisors gives as their function "to ensure adherence by operators of Transit Windsor rules and regulations". The majority itself acknowledges at paragraph 11 that these admonishments are largely "turn-key":

The Operations Supervisors are responsible for keeping track of these matters and, *according to steps provided in the collective agreement* trigger action that is undeniably disciplinary *if they accumulate to the requisite degree*.

5. I cannot agree that the administration of the "block system" is sufficient to bring the Operations Supervisors into management. As the majority states as paragraph 12:

There are penalties, expressed as up to a certain number of days suspension for various thresholds of the most common offences set out in the collective agreement, and the guidelines to the Operations Supervisors issued with the Block System indicate that a number (left blank) of infractions *requires* a letter of discipline, and a certain number, a suspension.

[emphasis added]

6. Accordingly, this Board member cannot agree that where individuals have freely determined they wish to bargain collectively with their employer that the Board should deny their legitimate wishes on the basis that management has delegated to them the administration and implementation of "admonishments" which are based on rules, regulations and guidelines. Surely something more is required in order for such low level (the "lowest level" in the words of the majority) front line supervisors to exercise managerial functions.
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3248-90-OH Wade Dennis Procter, Complainant v. Whitler Industries Ltd., Respondent

Adjournment - Health and Safety - Practice and Procedure - Complainant's counsel requesting adjournment on ground of unavailability on hearing date - Board explaining need for expedition and general reluctance to adjourn matters (in absence of consent) to accommodate party's convenience or counsel's calendar - Requested adjournment denied - Board noting that request may be renewed at commencement of hearing

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. H. Wightman* and *R. R. Montague*.

DECISION OF THE BOARD; April 5, 1991

1. This is a complaint under section 24 of the *Occupational Health and Safety Act* in which the complainant contends that his employment has been illegally terminated. The complaint was filed on March 18, 1991. In accordance with its usual practice, the Board appointed an Officer to meet with the parties to endeavour to effect a settlement pursuant to section 24(3) of the Act, and, in addition, gave notice that, failing settlement, a hearing would take place in Toronto on Tuesday, April 23, 1991.

2. By letter dated March 28, 1991, counsel for the complainant wrote to the Board requesting an adjournment of the scheduled hearing. Counsel indicates that she will not be available to proceed on April 23, and is concerned that since her organization is the only legal aid clinic in Ontario specializing in occupational health and safety matters, she is reluctant to refer the complainant elsewhere. She writes, in part:

"Unfortunately, were I to refer my client elsewhere it would be to the legal aid certificate program. He would find that there is not an abundance of lawyers specializing in health and safety matters on the employee side who in addition take legal aid certificates".

Counsel requests that the matter be adjourned to another date. No time frame or schedule of her availability is provided, nor does she indicate why she is not available on April 23. We note finally:

- (a) at the time counsel accepted this "retainer" the hearing date had already been fixed; and
- (b) the respondent opposes the request for an adjournment and is apparently anxious to get on with this case.

3. Section 24 of the *Occupational Health and Safety Act* is designed to provide employees with an expeditious and inexpensive remedy where they have been disciplined or discharged for acting in compliance with the Act or seeking its enforcement. Expedition is important for both parties; the employee because s/he may well be out of work pending a resolution of his/her rights under the *OHS Act*; and the employer, because its potential liability mounts with each passing week. Unlike the situation at common law, an employee who has been wrongly discharged is entitled to get his/her job back and receive compensation for all wages and benefits lost. S/he is not restricted to compensation only, and limited to the amount of notice of termination to which s/he would have been entitled. Furthermore, quite apart from the uncertainties, cost, or outcome for particular parties in particular cases, it is our view that the statutory objectives are best accomplished by a prompt and final resolution of workplace disputes. Against that background, once a hearing date has been fixed, the Board has been reluctant to adjourn the matter (in the absence of consent) to

accommodate a party's convenience or counsel's calendar. Nor prior to the commencement of a hearing has the Board been inclined to give much weight to the submission that (for various reasons) a particular solicitor is the only one uniquely qualified or available to handle a client's case.

4. Having considered the complainant's request for an adjournment, and the stated reasons therefor, the Board is not persuaded that the request should be granted. Such request may, of course, be renewed at the commencement of the hearing on April 23, 1991, at which time the employer will have an opportunity to respond, and the hearing panel may make such order, on terms or otherwise, as it considers appropriate in the circumstances then before it.

COURT PROCEEDINGS

1062-90-R (Court File No. 1158/90) Chapleau Forest Products Limited, Applicant v. Ontario Labour Relations Board, IWA-Canada, and IWA-Canada, Local 1-2995, Respondents

Certification - Evidence - Judicial Review - Membership Evidence - Membership cards headed by name of local union bringing certification application, but body of cards referring only to national union - Board ruling cards valid membership evidence for local union - Employer seeking judicial review - Court observing that Board made purely factual determination and that interpretation of a union membership form lay at the heart of Board's specialized jurisdiction - Judicial review application dismissed by Divisional Court

Board Decision reported at [1990] OLRB Rep. December 1243.

Ontario Court of Justice, Divisional Court, Steele, Montgomery and Campbell JJ., April 25, 1991.

Steele J. (endorsement): The board's characterization of the application before it turned entirely on its view of the evidence.

The board's entire determination proceeded on its factual view of the evidence about the form of the application cards, the effect of the words "Local 1 - 2995" in the heading and the other words in the document, the question whether a reasonable employee could have been confused by it, and the intent of the applicants. There was a crucial difference between the documents on the first application by the parent and the later application by the local because the first one did not refer to Local 1 - 2995 and the later one did. There was some evidence in the form of the document and the words "Local 1 - 2995" to support its conclusion. The board in making these purely factual determinations had the right to be wrong.

The interpretation of a union form is at the heart of the Board's specialized expertise. There is no basis in this purely factual determination for judicial review.

It was open to the board on the evidence before it to conclude that the parent and the local were separate entities for the purpose of this application. There was only one applicant for status as the exclusive bargaining agent. That was the application by the local. There was before the board no application by the parent to be the exclusive bargaining agent. The workers applied for member-

ship in both the parent and the local. Their application to join *both* the parent and the local did not turn local's exclusive application for status as exclusive bargaining status into an application by *both* the parent and the local. There was no application by the parent before the board and the board made no order in respect of the parent.

In view of the board's factual characterization of the application before it, it was open to it to conclude that its previous order under s.103(2)(i) did not bar this application.

While we have considerable doubt as to the correctness of the decision, we see no jurisdictional error or patent unreasonability. The application is dismissed.

Costs to the respondent fixed at \$3000.00.

[*The Applicant is seeking leave to appeal the Divisional Court's decision to the Court of Appeal: Editor*]

2241-86-R (Court File No. 735/89) Ontario Hydro, Applicant v. Ontario Labour Relations Board, The Society of Ontario Hydro Professional and Administrative Employees, Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union, Local 1000, the Coalition to stop certification of the Society on behalf of certain employees, Tom Stevens, C.S. Stevenson, Michelle Morrissey-O'Ryan and George Orr, Respondents v. The Attorney General of Canada, Intervener

Certification - Constitutional Law - Judicial Review - Stay - Board determining that it had no jurisdiction over employees working at nuclear generating stations which were federal undertakings pursuant to the *Constitution Act* and s.18 of the *Atomic Energy Control Act* - Divisional Court quashing Board decision - Court of Appeal reinstating Board decision and declaring that *Canada Labour Code* applies to Hydro employees employed at nuclear facilities coming under s.18 of the *Atomic Energy Control Act* - On application of Ontario Hydro, no one opposing, Court of Appeal staying its order

Board decision reported at [1988] OLRB Rep. 187; Divisional Court decision reported at [1989] OLRB Rep. June 698; Court of Appeal decision reported at [1991] OLRB Rep. Jan. 115.

Court of Appeal, Finlayson, Krever, Galligan JJ.A., April 2, 1991.

Finlayson J.A. (endorsement): On the application of Ontario Hydro, no one opposing, it is ordered that there be a stay of the order of this Court dated January 28, 1991 pending the final disposition of an application for leave to appeal the said order to the Supreme Court of Canada.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0808-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. Pre-Eng Contracting Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2591-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Carpino Carpentry Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0881-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Bren Electrical Contractors Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

0935-90-R: United Steelworkers of America (Applicant) v. Service Employees Union, Local 210 (Respondent)

Unit #1: "all employees of the respondent in the Counties of Essex, Kent, Lambton, Huron and Bruce, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and persons who are holding a position(s) on the respondent's Executive Board" (5 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all office and clerical employees of the respondent in the Counties of Essex, Kent, Lambton, Huron and Bruce, save and except supervisors, persons above the rank of supervisor, the executive secretary

to the business manager, union representatives, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods” (3 employees in unit) (*Having regard to the agreement of the parties*)

1114-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Federal Industries Consumer Group Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at its Cashway Building Centres Division in the Township of Chatham, save and except forepersons, persons above the rank of foreperson, and office and clerical staff” (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1653-90-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. V. J. McMullin Pipeline Welding & Fabrication Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (16 employees in unit)

1726-90-R: Sheet Metal Workers’ International Association, Local 30 (Applicant) v. Masterheat Mechanical Inc. (Respondent)

Unit: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent’s Modern Air Design Division in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent’s Air Design Division in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

2202-90-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Lodder Brothers Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (28 employees in unit)

2545-90-R: Ontario Nurses’ Association (Applicant) v. Oakville Lifecare Centre (Respondent)

Unit #1: “all registered and graduate nurses employed by the respondent in a nursing capacity in Oakville, save and except persons above the rank of Assistant Director of Care, persons regularly employed for not more than 24 hours per week” (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all registered and graduate nurses employed by the respondent in a nursing capacity in Oakville, regularly employed for not more than 24 hours per week, save and except persons above the rank of Assistant Director of Care” (9 employees in unit) (*Having regard to the agreement of the parties*)

2720-90-R: Amalgamated Clothing & Textile Workers Union, AFL:CIO:CLC: (Applicant) v. George Courey Inc. (Respondent)

Unit: “all employees of the respondent in the Town of Vaughan, save and except supervisors, persons above the rank of supervisor, sales staff, confidential secretary to the Vice-President, and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

2764-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Valbay Hotel Ltd. c.o.b. Valhalla Inn (Respondent)

Unit: “all front desk employees of the respondent at 1 Valhalla Inn Rd. in the City of Thunder Bay, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office and sales staff, and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

2784-90-R: Ontario Public Service Employees Union (Applicant) v. The General Hospital of Port Arthur (Respondent)

Unit: “all laboratory technicians, technologists and laboratory assistants employed by the Hospital in its medical laboratories in the City of Thunder Bay, regularly employed for not more than 22½ hours per week, save and except assistant chief laboratory technologist, persons above the rank of assistant chief laboratory technologist, practising members of the medical nursing staff, biochemists, and any employees in bargaining units for which any trade union held bargaining rights as of January 23, 1991” (12 employees in unit) (*Having regard to the agreement of the parties*)

2832-90-R: Canadian Union of Public Employees (Applicant) v. Georgetown & District Memorial Hospital (Respondent)

Unit #1: “all employees of the respondent at its Hospital in Georgetown, save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of January 28, 1991” (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit: “all office and clerical employees of the respondent at its Hospital in Georgetown, save and except supervisors, persons above the rank of supervisor, the Secretary to the Executive Director, the Secretaries to the Assistant Executive Directors and the Payroll Analyst” (21 employees in unit) (*Having regard to the agreement of the parties*)

2855-90-R: Strathroy District Ambulance Service Employee’s Association (Applicant) v. Denning Bros. Ambulance Services Ltd. (Respondent)

Unit: “all employees of the respondent at Strathroy, save and except managers and persons above the rank of manager” (12 employees in unit) (*Having regard to the agreement of the parties*)

2864-90-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Marchant Property Management Ltd. (Respondent)

Unit: “all employees of the respondent engaged in cleaning and maintenance at 57 Mabelle Avenue and 5005 Dundas Street West in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property and maintenance managers, persons above the rank of property and maintenance manager, office and clerical staff, persons regularly employed for not more than 19 hours per week and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

2866-90-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Robert Yan Drugs Ltd. c.o.b. Shoppers Drug Mart (Respondent)

Unit: “all employees of the respondent in the City of Oshawa, save and except supervisors, persons above the rank of supervisor, bookkeeper and pharmacists” (19 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2892-90-R: Hotel Employees Restaurant Employees, Local 75 (Applicant) v. Sunnybrook Hospital (Respondent)

Unit #1: “all employees of the respondent at McLean House, in the Regional Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, security personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of February 6, 1991” (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent at McLean House, in the Regional Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, security personnel, and employees in bargaining units for which any trade union held bargaining rights as of February 6, 1991” (15 employees in unit) (*Having regard to the agreement of the parties*)

2897-90-R: Service Employees Union, Local 210 (Applicant) v. The Windsor Essex County Real Estate Board (Respondent)

Unit: “all office, clerical and print shop employees of Windsor Essex County Real Estate Board in the City of Windsor, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*)

2909-90-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Robert Laframboise Mechanical Ltd. (Respondent)

Unit: “all boilermakers and boilermakers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all boilermakers and boilermakers’ apprentices in the employ of the respondent in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

2915-90-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Be Bop Inc. c.o.b. Studebakers (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto at 150 Pearl Street, save and except supervisors, persons above the rank of supervisor, office and accounting staff, and students employed during the school vacation period” (36 employees in unit) (*Having regard to the agreement of the parties*)

2917-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Community Lifecare Inc. (Respondent)

Unit: “all employees of the respondent in the Town of Port Hope, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, students employed during the school vacation period, and employees employed at Port Hope Villa, 65 Ward St., Port Hope” (66 employees in unit) (*Having regard to the agreement of the parties*)

2923-90-R: Sudbury Mine Mill & Smelter Workers Union, Local 598 of the Canadian Union of Mine Mill & Smelter Workers (Applicant) v. Northern Regional Residential Treatment Program for Women c.o.b. Lake-side Centre (Respondent)

Unit: “all employees of the respondent in Sudbury regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and students employed during the school vacation period” (6 employees in unit) (*Having regard to the agreement of the parties*)

2943-90-R: Ontario Public Service Employees Union (Applicant) v. Salvation Army Community Living (Respondent)

Unit #1: “all employees of the respondent in London, save and except residential supervisors, persons above the rank of residential supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (38 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except residential supervisors, persons above the rank of residential supervisor, office and clerical staff” (11 employees in unit) (*Having regard to the agreement of the parties*)

2948-90-R: Canadian Union of Public Employees (Complainant) v. The Corporation of the Town of Ajax (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in its Parks and Recreation Department, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons for whom any trade union held bargaining rights as of the date of application” (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2954-90-R: Service Employees’ International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O. (Applicant) v. North Yorkers for Disabled Persons Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, facilitators, office, and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, facilitators, office and clerical staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

2958-90-R: Christian Labour Association of Canada (Applicant) v. Versa-Care Ltd. c.o.b. as Marsdale Senior Centre (Respondent)

Unit: “all employees of the respondent in Cambridge, save and except supervisors, persons above the rank of supervisor, office and clerical staff, registered and graduate nurses and activation coordinator” (19 employees in unit) (*Having regard to the agreement of the parties*)

2968-90-R: Public Service Alliance of Canada (Applicant) v. Amethyst Women’s Addiction Centre (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except Executive Director, persons above the rank of Executive Director” (9 employees in unit) (*Having regard to the agreement of the parties*)

2976-90-R: Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Laidlaw Transit Ltd. (Respondent)

Unit: “all employees of the respondent in its Ontario Division Garage in Lindsay, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week and persons in bargaining units for which any trade union held bargaining rights as of February 14, 1991 being the application date” (7 employees in unit) (*Having regard to the agreement of the parties*)

2980-90-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Haldimand Board of Education (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Haldimand-Norfolk employed as Pro-

fessional Student Services Personnel, save and except superintendent, persons above the rank of superintendent” (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2994-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) v. Automotive Plastic Technologies Inc. (Respondent)

Unit: “all office, clerical and technical employees of the respondent in the City of Windsor, save and except managers, persons above the rank of manager” (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3022-90-R: Service Employees Union, Local 478 (Applicant) v. St. Joseph’s General Hospital of North Bay, Inc. (Respondent)

Unit #1: “all employees of the respondent at its St. Joseph’s Treatment Centre in North Bay, save and except supervisors, persons above the rank of supervisor, security guards, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of February 13, 1991, being the date of application” (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period at its St. Joseph’s Treatment Centre in North Bay, save and except supervisors, persons above the rank of supervisor, security guards, and persons in bargaining units for which any trade union held bargaining rights as of February 13, 1991, being the date of application” (12 employees in unit) (*Having regard to the agreement of the parties*)

3030-90-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. Fast Canadian Foods Corp. (Respondent)

Unit: “all employees of the respondent in the Town of Vaughan, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (10 employees in unit) (*Having regard to the agreement of the parties*)

3032-90-R: Ontario Public School Teachers’ Federation (Applicant) v. The Central Algoma Board of Education (Respondent)

Unit: “all occasional teachers employed by the respondent in its elementary panel in the District of Algoma, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*” (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3047-90-R: The Office & Professional Employees International Union (Applicant) v. The Kapuskasing Board of Education (Respondent)

Unit: “all teacher aides employed by the respondent in Kapuskasing, save and except supervisors, persons above the rank of supervisor” (7 employees in unit) (*Having regard to the agreement of the parties*)

3079-90-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Nelson Des Roches Regional Sandblasting & Painting Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

3097-90-R: Christian Labour Association of Canada (Applicant) v. I.O.O.F. Senior Citizen Homes Inc. (Respondent)

Unit: “all employees of the respondent in the City of Barrie, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, director of activities, adjuvant supervisor, registered and graduate nurses and office staff” (37 employees in unit) (*Having regard to the agreement of the parties*)

3117-90-R: Ontario Public Service Employees Union (Applicant) v. Surex Community Services (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, program assistant, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (58 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and program assistant” (54 employees in unit) (*Having regard to the agreement of the parties*)

3118-90-R: Ontario Public Service Employees Union (Applicant) v. The Salvation Army Adult Resources Centre (Respondent)

Unit: “all employees of the respondent in the City of Sault Ste. Marie regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisor and persons above the rank of supervisor, secretary/bookkeeper” (3 employees in unit) (*Having regard to the agreement of the parties*)

3128-90-R: Canadian Union of Public Employees (Applicant) v. Notre-Dame Hospital (Respondent)

Unit: “all employees of the respondent in Hearst, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses, paramedical staff, office and clerical staff, and persons in bargaining units for which any trade union held bargaining rights as of February 26, 1991” (79 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3134-90-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Gallace Painting & Decorating Co. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

3135-90-R: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers of America (Applicant) v. Bytown Lumber Inc. (Respondent)

Unit: “all office and sales staff of the respondent in Bell’s Corner in the City of Nepean, save and except the Floor and Sales Manager, persons above the rank of Floor and Sales Manager, persons employed for not more than 24 hours per week and students employed during the school vacation period and employees in any bargaining units for which any trade union held bargaining rights as of February 28, 1991” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2205-90-R: Canadian Union of Public Employees (Applicant) v. The Mississauga Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener)

Unit: "all employees of the respondent in Mississauga, Ontario employed as stationary engineers in the boiler room of the hospital and persons primarily engaged as their helpers, save and except the chief, persons above such rank" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	1

2450-90-R: Ontario Public Service Employees Union (Applicant) v. The Parry Sound District General Hospital (Respondent) v. The Association of Parry Sound Emergency Medial Attendants (Intervener)

Unit: "all employees of the respondent at Parry Sound, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, social workers, social work assistants, persons engaged in research work, technical and paramedical personnel, chief and stationary engineers, office and clerical, and the employees in bargaining units for which any trade union held bargaining rights on December 11, 1990" (144 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	177
Number of persons who cast ballots	89
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	74
Number of segregated ballots cast by persons whose names appear on voters' list	15
Number of ballots marked in favour of applicant	55
Number of ballots marked against applicant	19
Ballots segregated and not counted	15

2532-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Oxford County Board of Education (Respondent)

Unit: "all employees of the respondent in the County of Oxford employed as professional student services personnel, save and except superintendent of schools and persons above the rank of superintendent of schools" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	18
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	7

2571-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Cable Tech Company Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 1590 (Intervener)

Unit: "all employees of Cable Tech Company Limited in the Town of Whitchurch - Stouffville, save and except foremen, those above the rank of foreman, office, technical and sales staff and students employed during the school vacation period" (187 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	187
Number of persons who cast ballots	176
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	118
Number of ballots marked in favour of intervener	51
Ballots segregated and not counted	2

2835-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) v. Philips Electronics Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 1590 (Intervener)

Unit: “all employees of Philips Electronics Ltd., save and except all sales and service personnel, foreman, assistant foreman and persons above the rank of foreman; all office and clerical staff, engineers, engineering technologists and technicians, methods and time study personnel; quality control technicians and technologists; production planners and material expeditors; buyers, design and model shop technicians; industrial and tool designers; draftsmen, field service technicians; and printing and technical publications personnel; date processing personnel; truck drivers; security guards; mail delivery personnel; stationary engineers. This recognition extends to any Philips Electronics Ltd. plant within a radius of seventy-five (75) miles of Scarborough” (315 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	315
Number of persons who cast ballots	276
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	194
Number of ballots marked in favour of intervener	80

2836-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Brampton Hydro-Electric Commission (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: “all employees of the respondent, save and except supervisory foremen, persons above the rank of supervisory foreman, students, inside bargaining unit personnel, persons regularly employed for not more than 24 hours per week and individuals employed on a government sponsored program” (118 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	118
Number of persons who cast ballots	106
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	100
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of ballots marked in favour of applicant	95
Number of ballots marked in favour of intervener	5
Ballots segregated and not counted	6

2865-90-R: Canadian Union of Public Employees (Applicant) v. Hydro-Electric Commission of Kitchener-Wilmot (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: “all employees of the Commission in Kitchener-Wilmot, save and except crew foremen, persons above the rank of crew foreman, office staff, warehouse and engineering staff, persons employed for not more than 24 hours per week and employees covered by subsisting collective agreements” (70 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	70
Number of persons who cast ballots	67
Number of ballots marked in favour of applicant	44
Number of ballots marked in favour of intervener	23

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2572-90-R: Johnson & Johnson Medical Products Inc. (Applicant) v. United Electrical, Radio & Machine workers of Canada and its Local 540 (Respondent) v. Group of Employees (Objectors)

Unit: “all office, clerical and technical employees of Johnson & Johnson Medical Products Inc. in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, personnel assistants, histologists, professional engineers, sales staff, secretaries to the President and Division Heads and persons covered by existing collective agreements” (122 employees in unit)

Number of names of persons on revised voters' list	122
Number of persons who cast ballots	118

Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	114
Number of segregated ballots cast by persons whose names appear on voters' list	4
Number of ballots marked in favour of respondent	69
Number of ballots marked against respondent	45
Ballots segregated and not counted	4

Applications for Certification Dismissed Without Vote

2449-90-R: Ontario Public Service Employees Union (Applicant) v. Air-Dale Ltd. (Respondent) v. Group of Employees (Objectors) (38 employees in unit)

2741-90-R: Can-Ar Transit Operators Association (Applicant) v. Tokmakjian Ltd. (Respondent) (32 employees in unit)

3031-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of York (Respondent) (122 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2834-90-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. M. A. Henry Ltd. (Respondent) v. Dundas Toy Workers Union (Intervener)

Unit: "all hourly rated employees of the company at Dundas, Ontario, save and except foremen, and those above the rank of foreman, office staff and sales staff" (142 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	142
Number of persons who cast ballots	128
Number of ballots marked in favour of applicant	33
Number of ballots marked in favour of intervener	93
Ballots segregated and not counted	2

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2187-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Ratcliffs/Severn Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Richmond Hill, save and except supervisors, persons above the rank of supervisor, office, technical and sales staff" (120 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	117
Number of persons who cast ballots	113
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	105
Number of segregated ballots cast by persons whose names appear on voters' list	8
Number of ballots marked in favour of applicant	48
Number of ballots marked against applicant	57
Ballots segregated and not counted	8

2350-90-R: United Food & Commercial Workers International Union (Applicant) v. General Mills Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its Red Lobster Canada division in the City of Oshawa, save and except manager and persons above the rank of manager" (86 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	86
Number of persons who cast ballots	75
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	43

2731-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Vis-U-Ray Testing Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	25
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	15

Applications for Certification Withdrawn

0792-90-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. F. Urbisci Construction Inc. Dinec Forming Ltd., 888250 Ontario Ltd. (Respondent)

1989-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. H. J. McFarland Construction Company a Division of George Wimpey Canada Ltd. (Respondent)

2113-90-R; 2118-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. M.W.M. Construction of Kitchener Ltd. (Respondent)

2238-90-R: Operative Plasterers' & Cement Masons' International Association of the United States & Canada, Local Union No. 124 Ottawa, Hull, (Applicant) v. Denis Beaudoin Enr. Entrepreneur Specialiste (Respondent)

2425-90-R: Labourers' International Union of North America, Local 607 (Applicant) v. Litz Equipment Ltd. (Respondent)

2474-90-R: The Association of Parry Sound Emergency Medical Attendants (Applicant) v. The Parry Sound District General Hospital (Respondent) v. Ontario Public Service Employees Union (Intervener)

2549-90-R: United Brotherhood of Carpenters & Joiners of America, Lake Ontario District Council (Applicant) v. Mead Installations Ltd. (Respondent)

2826-90-R: Thomas Stauffer (Applicant) v. Service Employees' International Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Respondent) v. National Council of Jewish Women, Toronto Section Charitable Foundation - Bathurst/Prince Charles Outreach & Attendant Care Programs (Employer)

2839-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Church of St. Peters Children's Day Care Centre (Respondent)

2891-90-R: Ontario Public School Teachers' Federation (Applicant) v. Renfrew County Board of Education (Respondent)

2905-90-R: Teamsters Local No. 879 (Applicant) v. Aldershot Contractors Equipment Rental Ltd. and Aldershot Rentals, A Division of 905190 Ontario Ltd. (Respondents) v. International Union of Operating Engineers, Local 793 (Intervener) (*Withdrawn*)

2946-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Enmor Forming Inc. (Respondent)

3057-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Sirox Plastering Ltd. (Respondent)

3093-90-R: Hotels, Clubs, Restaurants & Taverns Employees Union, Local 261 (Applicant) v. Yu Far Investments Tim Hortons 8302N (Respondent)

3119-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Aldershot Contractors Equipment Rental Ltd. and 905190 Ontario Ltd. o/a Aldershot Rentals (Respondents)

3125-90-R: Hotel, Motel & Restaurant Employees Union, Local 442 (Applicant) v. Sheraton Fallsview, Hotel & Conference Centre (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2227-90-FC: United Steelworkers of America (Applicant) v. Placer Dome Inc. (Respondent) (*Granted*)

2443-90-FC: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Western Inventory Services Ltd. (Respondent) (*Withdrawn*)

2684-90-FC: International Brotherhood of Painters & Allied Trades (Applicant) v. Nor-Vac Industrial Services Ltd., L.S. Kosowan Ltd. (Respondent) (*Withdrawn*)

2740-90-FC: Labourers' International Union of North America, Local 607 (Applicant) v. The Corporation of the Municipality of Paipoonge (Respondent) (*Withdrawn*)

3082-90-FC: Teamsters Local Union No. 419 (Applicant) v. Clarke's Produce Canada Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0515-90-R: International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Preston & Lief Glass Ltd., Preston & Lief Glass Contracts Inc., Preston & Lief Glass (1988) Ltd., Preston & Lief Glass Door Ltd. (Respondents) (*Granted*)

2660-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Applicant) v. Terron Mechanical Ltd. & Tony Martino o/a Mountain School of Welding (Respondents) (*Granted*)

2769-90-R; 2770-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Sir Forming Ltd., 709631 Ontario Inc. (Respondent) (*Granted*)

SALE OF A BUSINESS

2908-89-R: Canadian Union of Public Employees (Applicant) v. The Ottawa-Carleton French Language School Board (Full Board), The Ottawa-Carleton French Language School Board (Catholic Sector), and The Ottawa-Carleton French Language School Board (Public Sector) (Respondent) v. Ottawa Board of Education Employee's Union (OBEEU) (Intervener #1) v. Service & Commercial Employees Union, Local 272 (Intervener #2) v. The Carleton Roman Catholic Separate School Board Employees' Association (Intervener #3) (*Dismissed*)

2909-89-R Canadian Union of Public Employees (Applicant) v. The Ottawa-Carleton French Language School Board (Full Board), The Ottawa-Carleton French Language School Board (Catholic Sector), and The

Ottawa-Carleton French Language School Board (Public Sector) (Respondent) v. The Carleton Roman Catholic Separate School Board Employees' Association (Intervener #1) v. Ottawa Board of Education Employee's Union (OBEEU) (Intervener #2) v. Service & Commercial Employees Union, Local 272 (Intervener #3) (*Granted*)

0515-90-R: International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Preston & Lieff Glass Ltd., Preston & Lieff Glass Contracts Inc., Preston & Lieff Glass (1988) Ltd., Preston & Lieff Door Ltd. (Respondents) (*Granted*)

2659-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Applicant) v. Terron Mechanical Ltd. & Tony Martino o/a Mountain School of Welding (Respondents) (*Granted*)

2769-90-R; 2770-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Sir Forming Ltd., 709631 Ontario Inc. (Respondent) (*Granted*)

CROWN TRANSFER ACT

0111-90-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Health (Hamilton Psychiatric Hospital) and Hamilton Community Support Association - Wellington Psychiatric Outreach Program (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0318-90-R; 1085-90-R: Douglas Eastman (Applicant) v. International Brotherhood of Electrical Workers, Local 586 (Respondent) v. Lorne's Electric - 291360 Ontario Ltd. (Intervener) (*Withdrawn*)

0516-90-R: Bonnie Sawyer and fellow employees (Applicant) v. Retail, Wholesale & Department Store Union, Local 414, AFL:CIO:CLC: (Respondent) v. Kent Drugs Ltd. (Intervener) (18 employees in unit) (*Dismissed*)

2584-90-R: Douglas Eastman (Applicant) v. International Brotherhood of Electrical Workers, Local 586 (Respondent) v. Lorne's Electric - 291360 Ontario Ltd. (Intervener) (7 employees in unit) (*Granted*)

2776-90-R: Brij Gawri and Parimal Chandra Dey (Applicants) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) v. Bombay Palace Restaurant Inc. (Intervener) (17 employees in unit) (*Granted*)

2899-90-R: Niel Bergeron (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 880 (Respondent) v. Canadian Welding & Manufacturing Co. Ltd. (Employer) (4 employees in unit) (*Dismissed*)

3078-90-R: Bernard Chalut, Aline Lévesque, Ginette Robinson, Monique Robinson, Camille St. Arnaud, Martine Taillon (Applicants) v. Office & Professional Employees International Union/Union Internationale des Employés Professionnels et de Bureau Canada Assurance-Vie (Respondent) v. Union of Canada Life Insurance/Union du Canada Assurance-Vie (Intervener) (6 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3367-90-U: Ariss Construction Inc. (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 18, and Labourers' International Union of North America, Local 837 (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2297-90-U: International Brotherhood of Painters & Allied Trades, Local 200 (Complainant) v. Preston & Lief Glass Ltd., Preston & Lief Glass Contracts Inc., Preston & Lief Glass (1988) Ltd. (Respondents) (*Dismissed*)

2894-90-U: Labourers' International Union of North America, Local 607 (Applicant) v. The Corporation of the Municipality of Paipoonge (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

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2778-89-U: Spar Professional & Allied Technical Employees Association (Complainant) v. Spar Aerospace Ltd. (Respondent) (*Granted*)

2787-89-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Centrac Industries Ltd. (Respondent) (*Withdrawn*)

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1088-90-U: United Steelworkers of America (Complainant) v. Cleveland Range Ltd. (Respondent) (*Withdrawn*)

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1449-90-U: Ottawa-Carleton Public Employees Union, Local 503 (Complainant) v. The City of Ottawa (Respondent) (*Withdrawn*)

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1664-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 414 (Complainant) v. Western Inventory Services Ltd. (Respondent) (*Withdrawn*)

1790-90-U: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (Complainant) v. Toronto Star Newspapers Ltd. (Respondent) (*Dismissed*)

1835-90-U: Mark Rocco (Complainant) v. International Brotherhood of Electrical Workers (Respondent) v. M.L.S. Cable Installations Inc. (Intervener) (*Dismissed*)

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2242-90-U: Service Employees Union, Local 210 (Complainant) v. Clinton Public Hospital (Respondent) (*Withdrawn*)

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2667-90-U: General Motors of Canada, St. Catharines, Ontario (Complainant) v. Jae Nourse and Canadian Auto Workers Union, Local 199 (Respondents) (*Withdrawn*)

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2730-90-U: Luigi Cavaliere Sr. (Complainant) v. Labourers' International Union of North America, Omer Leduc and Andy Jeanveau (Respondents) (*Withdrawn*)

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2853-90-U: Murray Douglas Jackett (Complainant) v. Local 222 CAW Oshawa, Att. Pat Clancy, District Rep., Truck Plant (Respondent) (*Withdrawn*)

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2677-90-OH: Mr. Guy Marlor and Local 16506 United Steelworkers of America (Complainant) v. Bay Concrete Products Ltd. (Respondent) (*Withdrawn*)

2841-90-OH: Robert Little (Complainant) v. Robert Scott Jr., Robert Scott Sr. and James N. Scott Cut Stone Ltd. (Respondent) (*Withdrawn*)

2924-90-OH: James Bates (Complainant) v. Peter Dickerson (Carpet Mill Outlet) (Respondent) (*Withdrawn*)

3021-90-OH: Denise C. Martin (Complainant) v. Albarrie Canada Ltd. (Respondent) (*Dismissed*)

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2571-89-G: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Blue Jay Spain (Respondent) (*Granted*)

2573-89-G: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Blue Mountain Construction (Respondent) (*Granted*)

2721-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. H. H. Robertson Inc. (Respondent) (*Withdrawn*)

3072-89-G: International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Preston & Lief Glass Ltd. (Respondent) (*Granted*)

0275-90-G: Labourers' International Union of North America, Local 1036 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Central Terrazzo & Tile Ltd. (Respondent) (*Withdrawn*)

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1405-90-G; 1406-90-G; 1407-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Accu-Wall Forming Ltd. (Respondent) (*Granted*)

1417-90-G: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. Lord & Burnham Inc. (Respondent) (*Dismissed*)

1669-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dufresne Piling Company (1967) Ltd. (Respondent) (*Withdrawn*)

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2706-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. C & P Lafontaine Excavating Ltd. (Respondent) (*Granted*)

2739-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 221 (Applicant) v. Lewin Kingston, A Division of Brousseau-Robidoux Enterprises Ltd. (Respondent) (*Granted*)

2746-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. 709631 Ontario Inc. (Respondent) (*Granted*)

2748-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. D.I. Construction Co. Inc. (Respondent) (*Granted*)

2823-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pit-On Construction Company Ltd. (Respondent) (*Granted*)

2824-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Westwood Drain Co. Ltd. (Respondent) (*Granted*)

2825-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. G. L. Drain Inc. (Respondent) (*Granted*)

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Strike - Remedies - Collective agreement providing that it shall not be a violation of the agreement for employees to refuse to cross a picket line established in support of a lawful strike - Employees refusing to cross - Whether "strike" within meaning of the *Act* - Collective agreement not authorizing violation of the *Act* - Board rejecting argument that employees acting without collaboration and out of fear for personal safety - Board declaring, *inter alia*, that strike unlawful and issuing cease and desist order and other remedial directions

HICKESON-LANGS SUPPLY COMPANY; RE TEAMSTERS UNION, LOCAL NO. 419 AND SAM SCRIVO, GARY SLOAN, RON SCOTT, NICK TARASCO, GEORGE FYFE, IAN QUIN, DAN HOLLAND, PAUL WHITE, ARMAND LAMONDAY, WAYNE HEBERT, GERRY DAULT AND CLAY BOWRING.....

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Termination - Construction Industry - Petition - Whether petition voluntary - Working foreman with supervisory responsibility initiating petition - Employees approached at a time when employer's work activity at a low point - Petitioner acknowledging that he might have expressed to employees hope of being reimbursed for legal fees by employer if termination application successful and employer grateful enough - Board not satisfied that petition expressing voluntary wishes of those who signed it - Application dismissed

D-K CONSTRUCTION LTD.; RE ANGELO GANASSIN; RE C.J.A., THE ONTARIO PROVINCIAL COUNCIL, C.J.A., THE CARPENTERS DISTRICT COUNCIL OF TORONTO AND VICINITY, LAKE ONTARIO DISTRICT COUNCIL, WESTERN ONTARIO DISTRICT COUNCIL, ONTARIO ACOUSTICAL AND DRYWALL DISTRICT COUNCIL, AND THEIR AFFILIATED LOCAL UNIONS 18, 27, 38, 93, 249, 397, 446, 494, 572, 675, 785, 1071, 1256, 1316, 1450, 1669, 1946, 1988, 2041, 2050, 2222, 2451, 2486 AND 2965

609

Unfair Labour Practice - Change in Working Conditions - *Hospital Labour Disputes Arbitration Act* - Employer failing to pay annual wage increase - Employer arguing that annual wage increases previously paid were product of negotiating process through employee-management committee, which process could not continue after certification - Board finding that clear pattern of wage increases had emerged prior to certification and that employer should have paid annual increase in accordance with established pattern - Freeze complaint upheld and compensation ordered - Board dismissing complaint alleging that failure to pay annual wage increase intended to penalize nurses for exercising rights under the *Act*

GEORGE ST. L. MCCALL CHRONIC CARE WING OF THE QUEENSWAY GENERAL HOSPITAL; RE O.N.A.

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Unfair Labour Practice - Construction Industry - Related Employer - Sale of a Business - Unionized company in business of installing concrete floors owned by four partners, all of whom were skilled cement masons - Non-Union competitor hiring the four partners - Board finding that assets of unionized company were skills, contacts and reputation of the four part-

ners - Board finding that, by acquiring exclusive services of the four key personnel, there was a sale of a business within section 63 of the *Act* - Related employer application dismissed - Unfair labour practice complaint upheld in part

ABLY CONCRETE FLOOR LIMITED AND TURNER MURRAY CONTRACTORS INC.; RE L.I.U.N.A., LOCAL 1059 AND L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL 579

Unfair Labour Practice - Evidence - Practice and Procedure - Remedies - Board permitting union to lead evidence of pre-certification matters particularized in earlier complaint withdrawn by union - Board ruling that plant manager's conversations with 2 prominent union supporters about low production neither punitive nor in violation of the *Act* - Board holding that decision to lay-off 17 employees in week following certification not improper, but employer motivated by anti-union animus in selecting employees for lay-off - Remedies including declaration, posting and compensation order - Board remaining seized with respect to any dispute about applicable compensation principles or calculation of compensation due

ANGELICA UNIFORM OF CANADA LTD.; RE A.C.T.W.U. 585

Unfair Labour Practice - Health and Safety - Remedies - Settlement - Parties settling *Occupational Health and Safety Act* complaint on basis of money payment to union - Settlement terms confidential and settlement providing that failure to maintain confidentiality will result in union reimbursing employer in full - Employee and union later disclosing that complainant had accepted cash settlement - Employer alleging breach of settlement - Complaint allowed and union directed to reimburse employer

NORTHFIELD METAL PRODUCTS LTD.; RE ALBERT PARSONS, AND G.M.P. ... 664

Witness - Certification - Evidence - Practice and Procedure - Board ruling that witness in non-pay inquiry may consult with and be advised by counsel during course of his testimony - Board directing witness to produce documents in his possession or control containing twenty original signatures - Board declining to compel witness to create twenty specimen signatures as requested by union counsel for use by expert witness

MOORE CORPORATION LIMITED; RE G.C.I.U., LOCAL N-1; RE GROUP OF EMPLOYEES 663

Witness - Construction Industry - Construction Industry Grievance - Practice and Procedure - Witness attending hearing under subpoena - Hearing adjourned *sine die* and Board directing witness to appear at any subsequent hearing date in accordance with subpoena - Matter brought back on for hearing and witness sent notice of hearing - Witness failing to appear - Union requesting that Board issue arrest warrant - Power to issue warrant to be used with caution and fairness - Board doubting technical foundation for warrant and declining to issue one

KING EDWARD CABINETS; RE C.J.A., LOCAL 27 642

0007-90-R; 0008-90-G; 0009-90-U Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council, Applicants/Complainants v. **Ably Concrete Floor Limited** and **Turner Murray Contractors Inc.**, Respondents

Construction Industry - Related Employer - Sale of a Business - Unfair Labour Practice - Unionized company in business of installing concrete floors owned by four partners, all of whom were skilled cement masons - Non-Union competitor hiring the four partners - Board finding that assets of unionized company were skills, contacts and reputation of the four partners - Board finding that, by acquiring exclusive services of the four key personnel, there was a sale of a business within section 63 of the Act - Related employer application dismissed - Unfair labour practice complaint upheld in part

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *C. A. Ballentine* and *W. N. Fraser*.

APPEARANCES: *L. A. Richmond* and *J. MacKinnon* for the applicants/complainants; *T. A. Crossman* and *Willis Turner* for Ably Concrete Floor Limited; *Barry Card* and *W. V. Hicks* for Turner Murray Contractors Inc.

DECISION OF THE BOARD; May 29, 1991

1. The name of one of the respondents appearing in the styles of cause of these matters is amended to read: "Ably Concrete Floor Limited".
2. In Board File 0007-90-R, the applicants have applied to the Board under sections 63 and 1(4) of the *Labour Relations Act* with respect to the bargaining rights of Labourers' International Union of North America, Local 1059 ("Local 1059") as the result of an alleged sale of a business by Ably Concrete Floor Limited ("Ably") to Turner Murray Contractors Inc. ("Turner") which is alleged to have taken place on or about February 1, 1990. The applicants have also applied for an order under section 1(4) of the Act.
3. It is the position of the applicants that a sale of a business did take place and as a result Turner is bound to the industrial, commercial and institutional collective agreement entered into by the Labourers' Employee Bargaining Agency and the Labourers' Employer Bargaining Agency and that Turner is required to meet within fifteen days of the giving of notice and to bargain in good faith and make every reasonable effort to make a collective agreement with the applicant in the non-industrial, commercial and institutional sector of the construction industry. With respect to the request for relief under section 1(4), the applicants seek a declaration that the respondents constitute one employer pursuant to that section.
4. In Board File No. 0008-90-G, the applicants have referred a grievance concerning the interpretation, application, administration or alleged violation of a provincial collective agreement to the Board for final and binding determination. The provincial collective agreement was entered into on May 16, 1988, and is operative from May 1, 1988, to April 30, 1990. In the grievance, the applicants have grieved on their own behalf and on behalf of its past and present members that Ably and Turner have violated the provincial collective agreement in respect of its projects in London and Sarnia. It is the position of the applicants that Ably and Turner have failed to apply the provincial collective agreement entirely and has thereby violated each and every article of the provincial collective agreement. In particular it is the position of the applicants that Ably and Turner have performed work covered by the provincial collective agreement without applying the provin-

cial collective agreement and have engaged subcontractors who are not in contractual relations with the applicants contrary to Article 2 of the provincial collective agreement. The applicants seek the following relief:

1. A declaration that Ably and Turner have violated the provincial collective agreement.
2. An order that Ably and Turner comply with the full terms and conditions of the provincial collective agreement forthwith.
3. An order that Ably and Turner pay to the applicant damages arising out of their violation of the provincial collective agreement, including the payment of wages and all other monetary benefits to the applicants in trust for employees who would have received these wages and other monetary benefits had Ably and Turner not violated the provincial collective agreement as aforesaid forthwith with interest.
4. An order that Ably and Turner pay to the applicants' union dues that the applicants would have received had Ably and Turner not violated the provincial collective agreement as aforesaid, forthwith, with interest.
5. An order that Ably and Turner pay to the appropriate recipients contributions in respect of industry, grading and retraining, pension funds contributions, welfare funds contributions and other contributions as required by the provincial collective agreement, forthwith, with interest.
6. Such further and other relief as may be appropriate in the circumstances.

5. In Board File No. 0009-90-U, the complainants have complained that on or about February 1, 1990, the respondents have dealt with the complainants contrary to the provisions of sections 3, 15, 64, 66, 70 and 79 of the Act. The complainants seek the following relief:

1. A declaration that the respondents have violated sections 3, 15, 64, 66, 70 and 79 of the Act.
2. An order that the respondents cease and desist from violating the Act as set out in the complaint.
3. An order that the respondents meet and bargain in good faith with the complainants and make every reasonable effort to make a collective agreement with the complainants.
4. An order that the respondents compensate the complainants for all damages they have sustained due to the respondents' violation of the Act.
5. Such further and other relief as may be appropriate in the circumstances.

6. The Board heard evidence from Willis Turner, the president of Ably, from William Hicks, the Vice-President of Turner, and from Gary Turner, the President of Turner.

7. After hearing the representatives of the parties, the Board ruled at the commencement of the hearing that in view of the commonality of the allegations of fact, the Board would hear the complaint under section 89 and the applications under sections 63 and 1(4) matters together initially, and, if appropriate, would subsequently hear the referral under section 124 of the Act.

8. Ably was incorporated on October 29, 1984, by four cement masons, namely, Willis Turner, Edward House, Sr., Edward House, Jr., and Douglas House. Each of them owns one of the four issued shares in Ably which was in the business of installing concrete floors until December of 1989. Willis Turner is the oldest of the four at fifty-nine and has more than thirty years of

experience in the trade of cement mason. Edward House, Sr., is fifty-four and has twenty-seven years of experience in the trade, Edward House, Jr., has nine years experience in the trade and Douglas House has seven years experience in the trade. Willis Turner is the sole director of Ably and is also its president. Edward House, Sr., is the secretary and Edward House, Jr., is the treasurer. In 1989 the last complete year of operations, Ably achieved gross sales between \$450,000 and \$475,000 and each partner received about \$50,000 from Ably.

9. Turner has been in existence since 1979. Certain changes in ownership which are not material to this application occurred between 1979 and 1981. In 1981 William Hicks became involved in Turner. There are one hundred and twenty-two issued shares of Turner. William Hicks owns fifty-one shares, Gary Turner owns fifty-one shares, their wives, Mrs. Hicks and Mrs. Turner each own an additional ten shares for a total of one hundred and twenty-two shares. Mr. Turner is the president with twenty-two years experience as a cement mason. Mr. Hicks is the vice-president. Mrs. Turner is the secretary and Mrs. Hicks is the treasurer. Turner is engaged in concrete floor finishing with some repair work. Most of its work is in the industrial, commercial and institutional sector of the construction industry. None of the persons referred to in paragraph 8 has any ownership or any financial interest in Turner. None of the persons referred to in this paragraph has any ownership or any financial interest in Ably. Willis Turner is the uncle of Gary Turner.

10. On November 14, 1989, the Board issued certificates to Local 1059, *iter alia*, with respect to "all construction labourers in the employ of [Ably] in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" and also with respect to "all construction labourers in the employ of [Ably] in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." Willis Turner and his three partners in Ably met with representatives of the applicant on December 6, 1989, at the offices of the applicant. It was explained to the four partners that they were bound by the Labourers' provincial collective agreement and there was some discussion of the other bargaining rights held by the applicant. After the meeting the four partners left the meeting with the applicant on December 6, there was a discussion as to whether Ably should carry on or fold up. On December 7 Ably received clearance to finish a job which was in progress and on the same day the employees of Ably requested their employment separation papers. It was the evidence of Willis Turner that depending on the weather this was the start of the slack time which would last until the Spring or about May. He added that the slack or slow time depended on the weather and/or the amount of work actually available. It was his assessment that there would be very little work in the Spring for Ably. The Board notes that there was very little evidence before the Board which supported this assessment by Willis Turner.

11. In fact Ably did not start up its operations in the Spring of 1990. Willis Turner stated that the reasons were that it could not afford the rates under the collective agreement, an inability to employ a person full-time in the office and an expectation that they would not be able to keep their steady customers and pay the rates under the provincial collective agreement. On December 6, 1989, Willis Turner at approximately 3:00 p.m. telephoned the offices of Turner and left a message for Gary Turner who returned the telephone call that evening. The evidence of Willis and Gary Turner about the contents of this and subsequent telephone calls is peculiarly short of details. For example, during this first telephone conversation, Willis Turner told Gary Turner that he was looking for work but did not say why and Gary Turner did not ask why. However, Gary Turner did say that he would have to speak to William Hicks. The conversation which lasted a couple of minutes according to Gary Turner also covered the fact that while no dates were mentioned, the three Houses were also looking for work. The next morning Gary Turner spoke to William Hicks

about his telephone conversation and told him that "Willie and the three Houses are looking for work." Gary Turner testified that he felt a little uncomfortable dealing with his uncle and decided to let William Hicks make the inquiries and make the decision.

12. On December 21, 1989, Willis Turner made a telephone call to William Hicks and Gary Turner. The call led to a meeting at the home of Willis Turner on Saturday, December 23, 1989. William Hicks had sought legal advice about the requests for employment. A decision had been made to hire the four partners before December 23. At the meeting the four were offered employment at the same rate as other employees, namely, sixteen dollars and fifty cents an hour. The evidence before the Board is that although William Hicks and Gary Turner were aware of Ably's relationship and obligations with the applicants, not a single question was asked and no points were raised. It is incredible that witnesses who admitted to being curious over the relationship between Ably and the applicants never once sought clarification. This is all the more strange given the fact that the reason legal advice was sought was certainly due to the relationship and obligations which flowed between Ably and the applicants.

13. Willis Turner made no secret of the fact to his customers that the four partners were going out of business as Ably and that they were working for Turner. He gave customers business cards from Turner. William Turner arranged for work which he had previously estimated for Ably's customers to be completed by the partners as employees of Turner at the same price after speaking to either William Hicks or Gary Turner. Turner invoiced for the completion of the work not Ably. In 1990 Turner attracted thirty-five new accounts. Of these new accounts six were for former customers of Ably. William Hicks was unable to tell the Board of the last occasion prior to December 1989 where Turner had hired cement masons in December. After the four partners had been hired by Turner, they spent several months working for former customers of Ably. Willis Turner did the estimating of jobs for Ably and from time to time he estimates for Turner under the supervision of William Hicks and Gary Turner.

14. Prior to December 1989, Ably and Turner were competitors. In 1989 Turner's sales figures were somewhat more than twice the sales figures for Ably. Willis Turner gave evidence that he was not asked for customer lists by Turner. He explained that as competitors, Turner and Ably had a very good idea of where the other's work was coming from. Willis Turner stated in evidence that quite frankly his skill, contacts and reputation made him attractive to Turner. Ably did not own any vehicles and operated its business out of the home of Willis Turner. Such assets which Ably did possess have not been disposed of. These include nine power trowels with a value of between \$1,200 and \$1,800, two wheelbarrows, and a few bags of hardner. The four partners continue to use Ably's power trowels from time to time because they are in better condition than the power trowels which Turner owns. However, Turner paid for the maintenance of these machines. Most of Ably's work was secured by requests by telephone for quotations on a job. The balance of work was generally secured by tendering to specific jobs. The former method was generally done with a minimum of formality with an invoice changing hands.

15. The issue in the application under section 63 is whether there has been a sale of a business from Ably to Turner. In *Raymond Coté*, [1968] OLRB Rep. Mar. 1211 at page 1214, the Board remarked that a business is the totality of the undertaking. The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assure its success. The total of these things along with certain intangibles such as goodwill constitutes a business. The transaction under consideration must necessarily be viewed in the context of the industry which is involved. In *The*

Tatham Company Limited, [1980] OLRB Rep. Mar. 366, the Board stated at pages 376-377 as follows:

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished [sic] on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a "sale of business" finding in one sector of the economy may be insufficient in another. In some industries, particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, "know-how", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 63 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

16. In the instant application, the physical assets, even bearing in mind that Ably operated in the construction industry, are minimal. Yet no one would dispute that the four partners were operating a business in the form of a company, namely, Ably. What were the assets of Ably? In our view they were the skills, contacts and reputation of Willis Turner and, to a lesser degree, the three Houses. The evidence before the Board established that cement masons are not readily hired in London. Even rarer are individuals like the four partners - cement masons with skills, contacts and good reputations. It is clear from the evidence that, by hiring the four partners, Turner added to its customer base and eliminated a substantial competitor. This was done against a background of Ably's newly acquired relationship and obligations with the applicants over bargaining rights. The four partners may be thought of as key personnel and, in the context of this application, by acquiring the exclusive services these four key personnel there was a sale of a business from Ably to Turner within the meaning of section 63 of the *Labour Relations Act*. Moreover, the Board finds that there has been an intermingling of employees as contemplated by section 63. Accordingly, Turner is bound by the provincial collective agreement referred to in paragraph 3. In addition, Turner is required to meet within fifteen days from the giving of notice or within such further period as the parties agree upon and bargain in good faith and make every reasonable effort to make a collective agreement with respect to the non-industrial, commercial and institutional sector of the construction industry. The application with respect to relief under section 1(4) is dismissed.

17. Having regard to the evidence before it, the Board finds that Ably has violated and Ably is hereby directed to cease and desist from violating sections 15, 66, 70 and 79 of the *Labour Relations Act*. The complaints with respect to Ably regarding sections 3 and 64 are hereby dismissed. The complaints with respect to Turner are premature and are hereby dismissed with respect to sections 3, 15, 64, 66, 70 and 79 of the *Labour Relations Act*.

18. The Registrar is directed to list the referral under section 124 for hearing. This panel of the Board is not seized.

1236-90-R The Bricklayers, Masons Independent Union of Canada, Local 1, Applicant v. **Amac Masonry Limited**, Uni-Tri Masonry Limited, Elgi Masonry Limited, Uni-Tri Masonry (1989) Limited and Bricknology Masonry Limited, Vercillo Brothers Masonry Limited, Scenic Masonry Limited, Respondents

Adjournment - Practice and Procedure - Counsel requesting adjournment because of unavailability due to scheduling conflict - Board concluding counsel's difficulty one of his own making and that circumstances not justifying adjournment merely to convenience counsel - Adjournment request denied

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. A. Correll* and *R. R. Montague*.

DECISION OF THE BOARD; May 23, 1991

1. At the hearing on May 21, 1991, and again by letter dated May 22, 1991, counsel for the respondent's Amac Masonry Limited and Uni-Tri Masonry Limited requested an adjournment of the May 31, 1991 hearing date scheduled in this matter. The basis for counsel's request is set out in his May 22, 1991 letter as follows:

Further to the commencement of the hearing of evidence in this case on Tuesday, 29th, 1991, [sic] and my submissions to the Board at the close of the hearing, I would request that the hearing date of May 31st, 1991 be cancelled and the matter adjourned for completion to the first of the remaining dates set of September 9th, 10th, 11th and 16th, 1991. I believe these remaining four dates should be sufficient to complete the case now that there is an agreed statement of the major facts in the case as well as an admission, without formal proof, of the majority of the exhibits.

The adjournment is requested as Counsel is before the Board on May 31st, 1991 in regards to Board Files 2920-90-R and 3054-90-U. These files deal with a certification application, which is going into its third day of hearing. The date of May 31st, 1991 was set along with 9 other hearing dates before I became Counsel on the matter.

While I was aware of the conflict with the dates, I had not anticipated that the case would in fact be litigated in the fashion it has and that I would have to attend the hearing on May 31st, 1991.

This is not the type of case on which I can brief another counsel to attend on May 31st, 1991 nor are the other two files ones in which I can properly brief another counsel to act.

In view of the above, I would ask the Board to grant an adjournment of the May 31st, 1991 hearing to accommodate counsel.

2. It is, of course, for the Board and not for the parties, or any of them, to determine the Board's practices and procedures. The Board's discretion with respect to determining whether an adjournment should be granted is a broad one. In that respect, it has long being recognized that labour relations delayed or labour relations defeated and denied (See *Journal Publishing Co. of Ottawa Ltd. et al v. Ottawa Newspaper Guild, Local 205, OLRB et al*, (March 31, 1977), Ontario Court of Appeal, unreported). It is well known that, in recognition of that reality, the Board will normally not grant an adjournment except on consent of the parties, or if it is satisfied that there are exceptional extenuating circumstances such that an adjournment is merited. A party which has had adequate notice of a hearing does not have a right to have it adjourned for the convenience of itself or its representative (Re: *Flamboro Downs Holdings Ltd. and Teamsters Local 1879*, (1979), 24 O.R. (2d) 400 (Ont. Div Court).

3. In this case, the parties and their counsel were consulted and specifically agreed to the hearing dates (including May 31, 1991) scheduled for it. Even though he knew of these dates, counsel for Amac Masonry Limited and Uni-Tri Masonry Limited accepted a retainer in another matter in which hearing dates had already been set, one of which dates conflicted with the May 31, 1991 hearing date in this matter. In doing so, counsel knowingly ran the risk that this conflict would not disappear as he anticipated or hoped it would.

4. In our view, the difficulty in which counsel finds himself is one of his own making, and the circumstances do not justify an adjournment of this proceeding merely to convenience him.

5. The applicant has refused to consent to an adjournment of the May 31, 1991 hearing as requested. In the absence of consent from all parties, we are not prepared to grant an adjournment as requested by counsel. This matter will therefore proceed on May 31, 1991 and the other hearing dates as previously scheduled.

0661-90-U Amalgamated Clothing and Textile Workers Union, Complainant v. Angelica Uniform of Canada Ltd., Respondent

Evidence - Practice and Procedure - Remedies - Unfair Labour Practice - Board permitting union to lead evidence of pre-certification matters particularized in earlier complaint withdrawn by union - Board ruling that plant manager's conversations with 2 prominent union supporters about low production neither punitive nor in violation of the Act - Board holding that decision to lay-off 17 employees in week following certification not improper, but employer motivated by anti-union animus in selecting employees for lay-off - Remedies including declaration, posting and compensation order - Board remaining seized with respect to any dispute about applicable compensation principles or calculation of compensation due

BEFORE: *Michael Bendel*, Vice-Chair, and Board Members *W. H. Wightman* and *E. G. Theobald*.

APPEARANCES: *Mike McCreary*, *Paul Filson*, *Al Trewin* and *Pat Sullivan* for the complainant; *John F. McGee*, *Paul Shepard* and *Larry Cahill* for the respondent.

DECISION OF MICHAEL BENDEL, VICE-CHAIR, AND BOARD MEMBER W. H. WIGHTMAN: May 15, 1991

I

1. This is a complaint under section 89 of the *Labour Relations Act*, in which the complainant alleges violations of sections 3, 64, 66, 70, 79 and 80 of the Act.

2. The Board (differently constituted) certified the complainant as bargaining agent for the respondent's employees in the Town of Lindsay in a decision dated May 18, 1990. (The plant in Lindsay was a new one, having opened in October 1989.) The complaint relates to two events, occurring within days of the certification, which, according to the complainant, were violations of the Act. The first event was the alleged disciplining, on May 22, 1990, of two employees who were among the most active supporters of the complainant. This discipline, according to the complain-

ant, was unwarranted and was imposed because of the role these two employees played in the union. Then, on May 23, 1990, the respondent laid off 17 employees. The complainant alleges that the laid off employees, for the most part, were among its supporters, and that the respondent was motivated by anti-union animus in laying them off.

II

3. While the complaint focuses on the two events that followed the certification, it also contains various allegations about conduct by the respondent before the certification. Specifically, it is alleged that the respondent, in violation of the Act, held “captive audience” meetings with employees, engaged in “surveillance” of a pro-union meeting, and supported a petition filed with the Board in opposition to the application for certification.

4. At the outset of the hearing, the respondent asked the Board to refuse to entertain evidence on these pre-certification matters. It noted that identical allegations had been made to the Board at the time of the application for certification and that they were withdrawn by leave of the Board. It drew our attention to the decision certifying the complainant (Board Files 0244-90-R and 0245-90-U), in which the Board stated the following:

7. With respect to the section 89 complaint, the applicant requested leave to withdraw the complaint as follows:

Pursuant to the Applicant being certified in accordance with File 0224-90-R, the complainant in the above matter withdraws the above referred to Complaint under section 89 of the Act. It is further understood between the parties that the Complainant may refer to the allegations refer [sic] to in its complaint in any subsquent [sic] proceeding before the Board.

8. The Board hereby grants the leave requested and, the complaint is withdrawn...

5. The complainant replied that it was not seeking any redress in respect of the pre-certification matters, but it felt that it was important for the Board to be aware of what had occurred between these parties. The complainant wanted the Board to draw inferences of anti-union animus from these matters. It pointed out that, in withdrawing the earlier complaint, it had specifically reserved the right to refer to the allegations in question in subsequent proceedings.

6. The Board ruled at the hearing that it would allow the complainant to lead evidence about the pre-certification matters since they could be of relevance to the complaint. As the Board held in *Craftline Industries Ltd.*, [1977] OLRB Rep. Apr. 246, the facts on which an earlier, withdrawn complaint were based can be used to establish the background to the complaint before the Board and to establish a pattern of activity. The Board has not accepted the view that the settlement of a complaint “obliterates the past” (see *Comstock Funeral Home Ltd.*, [1981] OLRB Rep. Dec. 1755, at page 1758).

7. Two employees, Phyllis Robertson and Angela Kehoe, called to testify by counsel for the complainant, gave evidence on the pre-certification matters referred to in the complaint. Although both Mr. Larry Cahill, the respondent’s Production Manager, and Mr. Paul Shepard, the Distribution Manager, gave evidence on various matters, their evidence barely touched on these pre-certification allegations.

8. The evidence of Ms. Robertson established that Mr. Cahill called a meeting of employees in the lunch room at the plant some time during the month of April 1990, after the complainant’s organizing drive had begun. The meeting was held during working hours. Mr. Cahill told the employees what a good employer the respondent was. He told them that the respondent would be

reasonable with its employees. He expressed disappointment that employees were not bringing their concerns to the "Works Committee". He stated that none of the respondent's plants was unionized and that none would be unionized. He told the employees that if any of them wanted to work in a union shop, they were welcome to leave their employment with the respondent.

9. Evidence was also given by Ms. Robertson and Ms. Kehoe about the respondent's surveillance of a meeting of union supporters. The complainant called a meeting of its supporters among the respondent's employees for Sunday, April 22, 1990, at a local motel. Mr. Cahill sat in his parked car across the street from the motel as employees were going into the meeting. Ms. Robertson approached Mr. Cahill and asked him if he was having car trouble. Mr. Cahill grumbled, muttered "Yes", got out of his car and walked away. It was obvious to Ms. Robertson that he was not in fact having any trouble with his car. Ms. Kehoe, in her testimony, added that one of the employees asked the police to investigate Mr. Cahill's presence there. A police officer later came to the motel. Both Ms. Robertson and Ms. Kehoe also testified that they saw Mr. Shepard's mini-van parked by the high school near the motel at the time of the meeting. Ms. Robertson testified seeing Mr. Shepard in the mini-van.

10. On April 24, 1990, the respondent held at least three meetings with its employees at the plant during working hours. Both Ms. Robertson and Ms. Kehoe testified about the meetings.

11. The first meeting, which started at about 7.00 a.m. in the lunch room, was attended by Mr. Cahill and Mr. Atkinson, the respondent's president. All of the staff were asked to attend. Mr. Atkinson did most of the talking. He stated that he would not work with a union. If the plant were unionized, according to Mr. Atkinson, the respondent would reconsider the Lindsay plant. He stated that the respondent was a good company, a fair one, which would take care of any complaints employees had. He asked the employees to trust the respondent. He expressed confidence in Mr. Cahill's management of the plant. He repeated that he would not work with a union and he invited anyone who wanted a union shop to look for work elsewhere.

12. At about 11.00 a.m. that day, Mr. Atkinson held a second meeting with employees. No employees who were known to be supporters of the complainant were invited to attend. Ms. Kehoe testified that she approached one of the supervisors about the meeting and was told that the meeting did not concern her. No evidence was presented to the Board on what was said at this meeting.

13. The third meeting on April 24 was also held during working hours. Mr. Atkinson and Mr. Cahill were there for the respondent. The only employees present were those who had not been invited to the second meeting of the day. Again, Mr. Atkinson did most of the talking. He said he wanted to communicate with employees. He said that improvements could be made in the running of the plant, and he offered to bring in engineers to time different functions and to train employees. He asked employees what their grievances were. When they listed their complaints about their working conditions, Mr. Atkinson dismissed some as "petty", rejected some, and said that he would see what could be done with others. He reiterated that the respondent had never had a union at its plants and would never have one.

14. The other pre-certification matter on which evidence was given was management involvement in the circulation of a petition in opposition to the complainant's application for certification. Ms. Robertson testified that she saw the petition in the hands of both Mr. Cahill and a supervisor named Kim. She stated that Kim approached her and asked her if she wanted to sign the petition. According to Ms. Robertson, this approach by Kim was after the second meeting held on April 24 and before the third one. Ms. Kehoe testified that another supervisor, Ms. Sharon Hughes, also circulated the petition. Mr. Shepard also testified on this matter. He stated that Mr.

Cahill gave him a copy of the petition, with employees' signatures, on April 25. He did not know how Mr. Cahill had obtained it. All of the signatures on the petition bore the date of April 24. Finally, it should be mentioned that the petition was filed with the Board, but only after the terminal date, with the result that it was untimely.

III

15. The complaint alleges that, on May 22, 1990, the first working day after the complainant was certified as bargaining agent, the respondent, in violation of the Act, disciplined two employees, Ms. Robertson and Ms. Marline Walker, for poor performance. Both of these employees were known to be strong supporters of the complainant.

16. Mr. Cahill testified that employees are paid piece work rates. However, if employees do not earn enough on piece work rates, the respondent brings their daily pay up to a guaranteed or "fall-back" rate of \$51.75, which is based on an hourly rate of \$5.75; Mr. Cahill referred to this as "subsidizing" employees. The respondent expects employees to earn substantially more than \$51.75 per day, which they can do by increasing their production. The target production for each employee is referred to as "100% production", which is what an experienced operator can be expected to produce. If employees produce at or above the 75% production level, they are not "subsidized" by the respondent.

17. During the week ending May 20, Ms. Robertson's production was low, between 45% and 56% of target production on three days, with the result that the respondent had to subsidize her. Mr. Cahill testified that he had never previously spoken to Ms. Robertson about below par production. Between the beginning of March and May 20, her weekly production had dropped below the 75% level three times. It had been above the 100% level twice during that period. He testified that he did not always talk to employees whose production was below the 75% level, although he usually did. He did not keep records of these conversations with employees. If he did not speak to them about production below the 75% level, it was probably because the low production was attributable to some factor beyond the employee's control. According to Mr. Cahill, there was no factor preventing Ms. Robertson producing above the 75% level during the week ending May 20.

18. On May 22, Mr. Cahill approached Ms. Robertson at her work station. Mr. Cahill testified that he drew Ms. Robertson's attention to her low production for the previous week, and told her that the respondent should not have to be subsidizing her. Ms. Robertson's reply was that she had been working on clipping and turning of collars the previous week, which was a new operation for her. Mr. Cahill testified that this was a simple operation, with a learning time of about 10 minutes, and that an employee should be able to do an adequate job within one hour. He told Ms. Robertson that this was not an acceptable excuse, and that he did not want to see this poor level of production in the future. He testified that he did not threaten Ms. Robertson with any consequences, and he did not believe that she would have felt her employment was jeopardized.

19. Ms. Robertson had been employed by the respondent since October 1989 as a machine operator. She testified that she had never previously been disciplined. She had previously received compliments on the quality of her work. Ms. Robertson did not dispute Mr. Cahill's account of their discussion on May 22. Nor did she dispute his numbers on her production for the week in question, or his account of the job of clipping and turning of collars. She testified that, during their conversation, Mr. Cahill, who was usually friendly and courteous, had been tense.

20. Mr. Cahill testified that on May 22 he also spoke to Ms. Walker about her production. In Ms. Walker's case, her production, on a daily basis, had varied between 46% and 65% during

the previous week. Her production had never previously dropped below the 75% level. Between the week ending February 23, 1990, and the week ending May 20, 1990, her weekly production had exceeded 100% four times, and had only been below 80% three times.

21. Mr. Cahill stated that he approached Ms. Walker at her machine. He showed her the production records from the previous week. He testified that Ms. Walker replied that she had not realized her production had slipped. She offered to forego the guaranteed rate of pay, but Mr. Cahill told her she would receive it. As with Ms. Robertson, Mr. Cahill testified that Ms. Walker was not threatened with any consequences for her below par performance, and he doubted that she would have felt her employment to be in jeopardy as a result of their discussion.

22. Ms. Walker was not called to give evidence. Ms. Robertson, whose work station is adjacent to Ms. Walker's, testified that she overheard part of the conversation between Ms. Walker and Mr. Cahill, but she could not add anything to Mr. Cahill's account of it. She did testify, however, that the previous week Ms. Walker had been given a new type of collar to work on and that Ms. Walker had asked her for advice on it.

IV

23. On May 23, 1990, the respondent told 17 machine operators that, at the end of their shift, they were being laid off. The total number of operators at the time was 35. The laid-off employees were recalled to work during June and July, with the latest recall date being July 11, although several employees chose not to return to work. The complainant alleges that both the decision to reduce staff and the decision as to which employees were to be laid off were taken in violation of the Act.

24. Mr. Cahill testified that the decision to reduce the work force was taken because of a shortage of work. He explained that the work at the plant, since its opening in October 1989, had been the manufacture of work shirts for Canada Post Corporation, other work shirts, golf shirts, laboratory coats, and aprons. The contract for Canada Post Corporation had been completed by the end of March 1990. He was able to arrange for the respondent's plant in Montreal to transfer to his plant the manufacture of some work shirts, which kept the plant busy for about six weeks. He tried, but without success, to arrange for other plants belonging to the respondent to transfer work to Lindsay. As of May 24, the only work on hand was on golf shirts. Mr. Cahill testified that, on May 23, his boss, Mr. Costa Orlando, the National Operations Manager, told him that there was no other work for the Lindsay plant. Mr. Orlando told him that the staff at Lindsay would have to be cut by at least 50%. Mr. Shepard spoke to the complainant's business agent on May 23 to inform him that there were going to be lay-offs as a result of a shortage of work. Mr. Cahill called two meetings of the machine operators towards the end of the shift on May 23. The operators at the first meeting were those who were going to be retained. Mr. Cahill told them why the respondent was forced to lay off the other employees and what work those remaining could expect to be assigned to during the period of lay-off. The second meeting was with the employees who were to be laid off. He explained to them the reason for the lay-off and told them they would be recalled as soon as possible.

25. Mr. Cahill and Mr. Shepard testified as to how the respondent had selected employees for lay-off. Their evidence was that the decision was made strictly on the basis of employees' ability to perform the work available at the plant. No account was taken of seniority. They denied that the decision was in any way influenced by employees' support of or opposition to the union.

26. There were two production methods at the plant. The main one was by means of a mechanized line, which moved items directly to the needle point and which required no physical

carrying of items by machine operators. This was referred to as “on-line production”. The other method was a “bundling system”, whereby, at different stages in the production, items were bundled together and transported manually to the next step. This was referred to as “off-line production”.

27. According to Mr. Cahill, the work available at the time of the lay-off was the production of golf shirts made of a knitted fabric. This was off-line production. He anticipated that the production of the golf shirts on order would take about three weeks. Some other production was planned, but the respondent was waiting for fabric to be delivered. In addition, the respondent’s warehouse needed six or seven additional employees for a period of about one week to clear up a backlog of work, and there was also some end-of-month work to be performed in the warehouse. The practice had been to transfer production employees to the warehouse to meet such needs.

28. Mr. Cahill reviewed the list of the 18 production employees retained at the time of the lay-off, and explained why each had been kept on strength. One was needed because of her experience in bagging and boxing of shirts; this employee also worked in the warehouse. Two were said to be top operators. Six were said to be experienced in working with knitted fabric. One was experienced in the operation of the button-hole machine and in buttoning. One was experienced in the use of a hand-iron. Two had experience in working in the warehouse, and would also be needed at short notice to restart the line. Another with warehouse experience was also a back-up operator for pockets. Three were described by Mr. Cahill as “utility operators”, by which he meant that they were able to perform several different operations.

29. Ms. Robertson and Ms. Kehoe qualified or disputed some of Mr. Cahill’s evidence about the skills or experience of employees not laid off. Thus, according to Ms. Kehoe, the learning time for bagging and boxing of shirts was about five minutes, while Ms. Robertson put it at about one hour. Ms. Kehoe, who was laid off, was herself experienced in bagging and boxing. Ms. Robertson also disputed that two employees described as utility operators by Mr. Cahill were in fact utility operators at the time. Ms. Kehoe added that several of the laid-off employees, including herself, had experience working in the warehouse. (Mr. Shepard acknowledged that four of the laid-off employees had experience working in the warehouse.) In addition, Ms. Kehoe noted that several of the laid-off employees were also experienced in working with knitted fabric or had skills similar to those of employees not laid off.

30. Ms. Kehoe and Ms. Robertson gave evidence about the attitude towards the union of those employees laid off and those retained. Eight employees were described by Ms. Kehoe and Ms. Robertson as the “core union supporters”. All eight were among those laid off. Of 12 employees who attended the union meeting in the motel on April 22, 11 were laid off. (The witnesses were not sure whether two other employees attended the meeting; of those two, one was laid off.) Of the four employees described by Ms. Kehoe as “strongly anti-union”, three were retained. Of the 18 employees retained, 14, according to Ms. Robertson, were not union supporters.

31. The petition filed with the Board in opposition to the application for certification was signed by 19 employees. Of those 19, seven were retained, the rest laid-off. Four of the employees who signed the petition were among those described by Ms. Kehoe and Ms. Robertson as being the “core union supporters”. Ms. Kehoe herself signed the petition; her explanation for doing so was that the petition was brought to her by a supervisor, Sharon Hughes, and that another employee told her that she should sign the petition unless she wanted to lose her job.

32. There was also filed in evidence an undated document that was signed by 20 employees. It bore no heading or text. It was a list of names and telephone numbers, with the word “Yes” written next to each name. It appears that this document was circulated by union supporters at an

early stage of the organizing drive to gauge the extent of interest in union representation. Employees signed if they were interested in the union. Originally, it was circulated discreetly, but later the list was posted on a bulletin board. Mr. Cahill, it appears, removed the list from the bulletin board and retained possession of it. Of the 20 names on the list, two, it seems, were not employed in the Production Department at the time of the lay-off. Of the remaining 18, 11 were laid off and seven retained.

33. Mr. Cahill testified that he did not know whether each machine operator was or was not a union supporter. He acknowledged that he knew Ms. Robertson and Ms. Walker were strong union supporters. Several other employees wore pro-union buttons at work. Mr. Cahill did testify that, on May 22, two employees asked to meet with him. Speaking on behalf of themselves and colleagues, they asked Mr. Cahill why their petition had been rejected by the Board. One of these two employees, together with a colleague, had appeared at the Board on behalf of the objectors. (Both of the employees who met with Mr. Cahill were retained at the time of the lay-off.) Mr. Shepard stated that, of the Production Department employees, he was not sure which were union supporters.

34. During the period of lay-off, a certain amount of overtime work was performed in the Production Department. During the week ending May 27, 24 hours of overtime were worked, and in subsequent weeks the numbers were 1 hour 50 minutes, 2 hours, 25 hours, 80 hours and 2.5 hours. Ms. Robertson also testified that, on about June 1, when she returned to the plant to pick up a pay cheque, she noticed that several employees were working in on-line production. The complaint alleged that three new employees were hired during the period of lay-off, but this was denied by the respondent and no evidence in support of the allegation was presented. Recalls started on June 8, when one employee was called back. During the week ending June 17, seven employees were recalled. During the week ending July 8, a further eight employees were recalled. The remaining employee was recalled on July 11.

V

35. We can dispose briefly of the allegation that the respondent violated the Act by disciplining Ms. Robertson and Ms. Walker on May 22. In our view, there was no violation of the Act. It is true that Mr. Cahill, although not consistently following the practice of drawing employees' attention to their low production, chose to do so in the case of Ms. Robertson and Ms. Walker the working day following the certification. However, we are not persuaded that Mr. Cahill's conversation with these employees can properly be regarded as disciplinary or punitive. As we view the evidence, this was a case of a manager bringing to employees' attention that their production had fallen below an acceptable level. The employees were not threatened with any consequences if their performance did not improve, nor would they have likely seen any implicit threat in Mr. Cahill's remarks. Ms. Robertson, in her testimony on this, merely observed that Mr. Cahill was tense at the time. We also note that it was not the respondent's practice to record, for future reference, discussions with employees about below par performance. Finally, we note that it is not disputed that their performance was in fact unsatisfactory during the week in question. Looking at the evidence as a whole, we are not satisfied that Mr. Cahill's discussions with Ms. Robertson and Ms. Walker constituted violations of the Act.

36. On the matter of the lay-off, two separate arguments have been put forward by counsel for the complainant. He has argued, in the first place, that the decision to reduce staff was not motivated by legitimate business considerations but by a desire to punish employees at Lindsay for supporting the union. Counsel observed that Mr. Cahill could only testify that he had been instructed by Mr. Orlando to reduce the staff at Lindsay because of a shortage of work. In order

for the respondent to have discharged its burden of satisfying the Board that a staff reduction was necessary as a result of a shortage of work, it should have called Mr. Orlando to give evidence since he was the real decision-maker. As a result of the failure of Mr. Orlando to testify, the Board, according to counsel, has not received first-hand evidence of the reasons underlying the respondent's decision to reduce staff. In support of this argument, counsel also contends that it could scarcely be coincidental that while lay-offs at the plant had not previously occurred, a major lay-off took place the week following the union's certification. He suggested that the amount of overtime worked during the lay-off was significant, which confirmed that there was no real shortage of work. The second argument put forward on behalf of the complainant was that, even if there was a shortage of work, the respondent chose to lay off union supporters, rather than base its selection solely on proper business criteria.

37. We have not been satisfied that the reduction of staff as such was improper. If lay-offs come during an organizing drive, it is plausible to suggest that the employer is motivated by a desire to persuade employees to back away from certification. Such a motivation, although illegal, might at least appear rational to an employer. But if lay-offs occur after a union is certified, it is less obvious what improper motivation an employer might have. The complainant asks us to hold that, after it had been certified, the respondent chose to idle the plant as a means of showing its displeasure with the desire of a majority of the employees to be represented by the complainant. We cannot completely discount the possibility that an employer, out of a desire to retaliate against "disloyal" or "ungrateful" employees, would choose to lay them off and reduce production, even though it had orders to fill, although counsel was not able to refer us to any cases where it has been found that an employer has acted in this rather irrational way. Nor can we entirely rule out the possibility that, after the certification, the respondent chose to divert work from its Lindsay plant to other plants as a means of demonstrating its displeasure with its Lindsay employees.

38. We shall have more to say later in this decision on the respondent's alleged violations of the Act before the certification. However, looking at the evidence as a whole and even accepting that the respondent violated the Act, as alleged, prior to the certification, we are not prepared to conclude that the lay-offs were anything other than the result of a shortage of work. The main reason for this conclusion is that the partial shut-down of a plant for a period of some six weeks would be such an unusual employer response to a certification that we cannot readily infer that the respondent's decision in this case was motivated by anti-union animus. Some evidence would be required to persuade us that this employer chose to "cut off his nose to spite his face" in this way, and supporting evidence was lacking. The unprecedented nature of lay-offs at this plant is scarcely persuasive since the plant was a new one. The amount of overtime worked at the plant during the lay-off does not appear to us to suggest that the respondent reduced the staff below a level necessary to fill orders on hand. Although the timing of the lay-off might be suspicious, we have no reason to doubt Mr. Cahill's evidence to the effect that he was trying to secure work for his plant from other plants belonging to the respondent, and that the lay-off was decided upon only after his efforts had failed.

39. The next question we must consider is whether the respondent's selection of employees for lay-off was tainted by a consideration of their support for the union.

40. In our view, the evidence supports the conclusion that the respondent had a very good idea who the union supporters were among the work force. Several employees had worn pro-union buttons. Messrs. Cahill and Shepard had engaged in surveillance of the union meeting at the motel. Mr. Cahill and two supervisors had been engaged in the circulation of the petition. On April 24, the respondent had held separate meetings of its staff during working hours, with the pro-union employees being invited to the third meeting of the day, and the others being invited to

the second meeting. Following the certification, Mr. Cahill met with two employees to discuss the fate of the petition.

41. The evidence indicated that there was some volatility in support for the union. We were told that various employees supported the union at one time and then switched sides. Several persons who were later to become opponents of the union signed the undated document of support for the union (referred to in para. 32 above). We also note that several strong union supporters signed the petition against the application for certification (allegedly because of the respondent's intimidation tactics). Despite these changes, real or apparent, in employees' support for the union, we are satisfied that the respondent made it its business to know who was for and who was against the union. We are satisfied that Mr. Cahill had a very good idea where the complainant's support lay among the employees.

42. We have compared the list of employees laid-off and the list of employees who were exhibiting support for the complainant at the time of the certification. All eight of the "core union supporters" were laid off. Eleven of the twelve employees attending the motel meeting were laid off. Of the 18 employees retained, 14 were not union supporters. To say the least, there was a close correlation between supporting the complainant and being laid off.

43. This correlation has to be viewed in context. The respondent had demonstrated a strong opposition to the complainant during its organizing drive. Without going into a detailed analysis of the pre-certification allegations, we are satisfied that its conduct, in the form of captive audience meetings, surveillance of a union meeting and support of a petition, overstepped the limits of what is permitted by the Act. A few days after the complainant was certified, it laid off employees and, in so doing, retained, for the most part, the anti-union employees and laid off, for the most part, the pro-union employees. These facts give rise to a strong inference that it was motivated by anti-union animus in selecting employees for lay-off.

44. The onus on a respondent in a complaint of this nature was discussed by the Board in *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745. Although that was a case where the alleged unlawful conduct was a discharge, the Board's observations in that case are just as relevant to a case of an alleged unlawful lay-off. This is what the Board said about the onus on the employer (in paragraph 17):

... the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for discharge are the only reasons and second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

45. We do not entirely discount the respondent's explanation as to why certain employees were retained. It seems probable that the respondent wanted to ensure that the retained staff would be able to meet production needs. However, this objective could have been accomplished in several different ways since many of the employees were able to perform various tasks. It is obvious from the explanation we heard that there was a substantial subjective component in the selection of employees for retention and lay-off. Given the very high incidence of lay-off among union supporters, the context in which these lay-offs were effected, and the explanation advanced by the respondent, we find that the respondent has not discharged its burden of satisfying the Board that its selection of employees for lay-off was untainted by anti-union motive. It appears to us likely from the evidence as a whole that the respondent, faced with the need to reduce its staff for a

period of several weeks, decided it would use the opportunity to reward “loyal” employees who had opposed the complainant and to punish “disloyal” ones who had been responsible for the complainant being certified by the Board. By acting in this way, the respondent violated section 66 of the Act, which reads, in part, as follows:

66. No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

46. Our conclusion, therefore, is that the decision to reduce staff in May 1989 was likely a legitimate business decision, but that the selection of employees for lay-off was tainted by anti-union animus. The evidence does not enable us to state with precision which particular employees were laid-off in violation of the Act. Although it is obvious that, as requested by the complainant, employees who were laid-off in violation of the Act are entitled to be compensated, we heard no argument on the compensation principles applicable to a situation where the selection of some of the employees for lay-off was likely lawful, but others were likely laid off in violation of the Act.

47. We declare that the respondent has violated section 66 of the Act. We order the respondent to post the notice in the attached Appendix in a conspicuous place on its premises where all employees may have an opportunity to see it for a period of 60 consecutive working days. We order the respondent to compensate employees for the violation of the Act. As requested by the parties, we will remain seized for the purpose of resolving any dispute about the applicable principles for compensating employees or about the calculation of the compensation due.

DECISION OF BOARD MEMBER E. G. THEOBALD; May 15, 1991

1. I participated in and contributed to the foregoing determination. However, my conclusions diverge from those of my colleagues pertaining to the warning/discipline of Ms. Walker and Ms. Robertson as well as the lay off. Paragraph 35 of the decision states:

We can dispose briefly of the allegation that the respondent violated the Act by **disciplining** Ms. Robertson and Ms. Walker on May 22... However, we are not persuaded that Mr. Cahill’s conversation with these employees can be properly regarded as **disciplinary** or **punitive**...we are not satisfied Mr. Cahill’s discussions with Ms. Robertson and Ms. Walker constitute violations of the Act.

[emphasis added]

2. The decision erroneously states that the allegation was one of discipline. Schedule “B”, paragraph 15 of the subject complaint reads:

On or about May 22nd, 1990, the first work day after the Complainant became certified, Ms. Robertson and Ms. Walker received verbal **warnings** from Larry Cahill regarding their work performance. This is the first time that either of these employees had been **warned** regarding their work performances.

[emphasis added]

Clearly the allegation is that the employees were **warned**.

3. The decision outlines the anti-union activities undertaken by management personnel on

behalf of the respondent company. The intimidating nature of these practices was emphasized by the presence and direct participation of the company president and vice-president of human relations from St. Louis, Missouri. Such conduct is prohibited by provisions in the *Ontario Labour Relations Act*.

4. I perceived a negative inference concerning the credibility of some of the management people. Direct evidence as noted in paragraph nine of the decision indicates that Mr. Cahill was subjecting a legal union meeting to surveillance. When confronted by Ms. Robertson, Mr. Cahill demonstrated he was capable of falsehoods. Ms. Robertson on the other hand projected a forthright image, her testimony had a veracious ring to it.

5. The following facts have a direct bearing on the propriety of the warnings meted out to Ms. Walker and Ms. Robertson:

(a) Under the company's piece work system, incentive money is earned when production levels are at 75% or above.

(b) Production of Ms. Walker:

- during the week previous to the warning, daily production varied between 46% and 65%;

- previous to this instance, production levels never below 75%;

- between the weeks ending February 23, 1990 and May 20, 1990, production exceeded 100% for four weeks and was below 80% for three weeks.

(c) Production of Ms. Robertson:

- during period in question below 75% for three weeks above 100% for two weeks;

- it was common ground that she was **never warned for similar levels of production in the past.**

6. The system of piece work remuneration implemented at Angelica imposes a serious loss of income when production levels are deemed to be insufficient. Production during the approximate three month period fluctuated from low to above 100%. The variations occurred during the period of time when the union was organizing the workplace. Local management in consort with senior company officials from St. Louis Missouri conducted a *virulent* anti-union campaign which included *stringent* surveillance of employees engaged in *legal* union organizing activities.

7. The decision in the last sentence of paragraph 17 states: "According to Mr. Cahill, there was no factor preventing Ms. Robertson producing above the 75% level during the week ending May 20". I can only conclude Mr. Cahill was somewhat less than frank or singularly lacking in cognizance relative to the punitive effect of subjecting employees to the intensity of the anti-union campaign initiated by the respondent, contrary to the *Act*.

8. Neither employee had been warned in the past. The warnings by Mr. Cahill were a break from past practice and devoid of valid reasons.

9. These two leading union supporters were singled out and warned. The respondent

failed to demonstrate that the warnings were free of anti-union animus. The foregoing leads me to conclude that the warnings constitute a breach of the *Act*.

10. Paragraph 37 of the decision of the Board pertaining to lay off, in part, reads as follows:

...We cannot completely discount the possibility that an employer, out of a desire to retaliate against "disloyal" or "ungrateful" employees, would choose to lay them off and reduce production, even though it had orders to fill, although counsel was not able to refer us to any cases where it has....Nor can we entirely rule out the possibility that, after the certification, the respondent chose to divert work from its Lindsay plant to other plants as a means of demonstrating its displeasure with its Lindsay employees....

[emphasis added]

Mr. Costa Orlando, the National Operations Manager, was the person who made the decision to lay off employees. To discharge the requirements imposed by reverse onus the respondent should have called as a witness the decision-maker Mr. Orlando. As noted in the decision of the Board, the employer brought senior management people to Canada from St. Louis Missouri to actively engage in anti-union activities. I perceive this was done with considerable facility, but the respondent did not call Mr. Orlando. *That absence from the witness stand is glaring and fatal.*

11. I conclude the lay off is a breach of the *Act*.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A HEARING BEFORE THE BOARD. THE BOARD FOUND THAT ANGELICA UNIFORM OF CANADA LTD. VIOLATED SECTION 66 OF THE LABOUR RELATIONS ACT. IT HAS ORDERED US TO COMPENSATE EMPLOYEES WHO WERE ILLEGALLY SELECTED FOR LAY-OFF IN MAY 1990, AND IT HAS ORDERED US TO INFORM EMPLOYEES OF THEIR RIGHTS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS;

WE WILL NOT DISCRIMINATE AGAINST A PERSON IN REGARD TO EMPLOYMENT OR ANY TERM OR CONDITION OF EMPLOYMENT BECAUSE THE PERSON WAS OR IS A MEMBER OF A TRADE UNION OR WAS OR IS EXERCISING ANY OTHER RIGHTS UNDER THE LABOUR RELATIONS ACT;

WE WILL COMPENSATE EMPLOYEES WHO WERE ILLEGALLY SELECTED FOR LAY-OFF IN MAY 1990.

ANGELICA UNIFORM OF CANADA LTD.

PER: _____

AUTHORIZED REPRESENTATIVE

This is an official notice of the Board and must not be removed or defaced.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE WORKING DAYS

DATED this 15th day of MAY, 1991.

1810-89-U John Clark et al., Complainants v. Representatives Association of Ontario; Local 414 of the Retail, Wholesale and Department Store Union, AFL-CIO-CLC; and Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Respondents

Evidence - Practice and Procedure - Respondent's witness introducing evidence of conversations and circumstances not suggested to or put to complainants when they testified - Complainants objecting - Rule in *Browne v. Dunn* reviewed and explained - Board allowing evidence that does not contradict complainants' case and that simply adds further details - Complainants to be given appropriate latitude should they choose to call reply evidence

BEFORE: *Paula Knopf*, Vice-Chair.

DECISION OF THE BOARD; May 9, 1991

1. The purpose of this decision is to provide written confirmation and clarification of an oral ruling given by the Board on April 5, 1991 with respect to an issue of evidence that arose in the course of this hearing. The substantive issues in the case involve allegations of violations of section 68 of the *Labour Relations Act*. There are three complainants. Each of them gave extensive evidence over numerous days of hearings. They and their supporting witnesses were examined and subjected to lengthy cross-examinations. The cross-examinations were detailed and rigorous. These cross-examinations often covered several days of hearings.

2. The evidentiary issue which requires this interim ruling arose when the respondents began to call evidence in defense of the complaint. The Representatives Association of Ontario's [RAO] first witness Dan Garvey, began to give evidence concerning events and conversations which had been attested to by all of the complainants and other supporting witnesses. In some aspects of Mr. Garvey's evidence, his testimony directly contradicted the evidence given by or on behalf of the complainants. In those situations, the evidence that Mr. Garvey gave had been suggested to the complainants or their witnesses during their cross-examinations and they had had the opportunity to react to the evidence. However, other aspects of Mr. Garvey's testimony introduced evidence of conversations and circumstances which had not been suggested to or put to the complainants or their witnesses when they were testifying. For example, Mr. Garvey added further details to conversations that had been the subject of extensive cross-examination of the complainants, even though these new details had never been suggested to the complainants. Counsel for the complainants took objection to this type of evidence arguing that it offended the rule in *Browne v. Dunn* (1893), 6 R. 69 (H.L.). Counsel for the complainants argued that the rule in *Browne v. Dunn* should prevent the respondents from calling any evidence that was different from evidence given by the complainants and that had not been suggested to or put to the complainants while they were on the witness stand. Counsel for the complainants argued that the rule in *Browne v. Dunn* is one of fairness and expediency to ensure a witness has a chance to respond to evidence that will be called against him or her and to ensure that the trial is conducted in a controlled and practical way. The Board was reminded of its policy of applying the *Browne v. Dunn* rule as was done in the case of *Luciano D'Alessandro and Donato Marinaro*, [1985] OLRB Rep. Feb. 241.

3. Counsel for the RAO responded to the objection by arguing that the evidence his client wished to introduce did not offend the rule in *Browne v. Dunn* because it was not being tendered to impeach the complainants' credibility or contradict their testimony. Instead, it was said that the evidence was being offered to add further details and recollections of conversations than had been introduced by the complainants. Further, counsel for the respondent RAO undertook that the

Board would not be asked to impute any lack of credibility against the complainants with regard to any of the details given by the respondents which had not been put specifically to the complainants. Counsel for Representatives Association of Ontario also introduced the case of *Machado v. Berlet et al.* (1986) 15 C.P.C. 2d 207 (H.C.J.) and *J. Sousa Contractor Limited*, [1988] OLRB Rep. October 1027.

4. Counsel for the respondent R.W.D.S.U. adopted the argument of counsel for the Representatives Association of Ontario and argued that the evidence sought to be introduced should not be seen as contradicting the evidence called by complainants or be seen as evidence that would be used to impeach the credibility of the complainants. Instead, the Board was asked to consider the evidence as “filler” or details being offered on issues that were not matters of credibility and which could be used in conjunction with the evidence of the complainants on the critical points.

5. In reply, counsel for the complainants argued that no meaningful distinction can be drawn between evidence offered to “contradict” the testimony of the complainants from evidence that would be “different” than the evidence of the complainants. Mr. Wray expressed concern over the possibility of having to recall the complainants to deal with some of the statements and thus prolonging an already very lengthy proceeding.

6. The rule in *Browne v. Dunn*, *supra*, imposes a duty on an opposing counsel to give a witness an opportunity to explain evidence which will be called later to impeach the credibility or testimony of that witness. Fundamentally, the rule is one of fairness and is meant to exclude evidence that was not first offered to an opposing witness to give him/her a chance to rebut it. It is useful to quote the original rule and its rationale from *Browne v. Dunn* where Lord Herschell explained:

“Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that *if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.* Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.

[emphasis added]

The rule in *Browne v. Dunn* is applied in two specific ways. First, the rule is applied with regard to using evidence to impeach the credibility of a witness. The decision in *Machado v. Berlet, et al. supra*, makes this clear where it is said at page 218:

The rule in *Browne v. Dunn* imposes on an opposing party the duty of giving a witness an opportunity of explaining evidence which the cross-examiner *intends to use later to impeach the witness's testimony or credibility.* In other words, a cross-examiner must expressly put to the witness the substance of evidence which is to be later tendered in an attempt to contradict the witness. Thus, a witness's testimony cannot later be *impeached by contradictory evidence* unless the

contradictory evidence has been previously put to the witness in an express and particularized manner. ...

[emphasis added]

In the *Machado v. Berlet et al.* case *supra*, Mr. Justice Ewaschuk explained what he means by “impeach” with respect to the application of the rule in *Browne v. Dunn* by saying impeach means “to call into evidence the veracity of evidence given by a witness by calling evidence to contradict, challenge or impugn the witness’s prior testimony”.

7. A second consideration in the applicability of *Browne v. Dunn* is whether the evidence relates to substantive or significant facts rather than to collateral facts. This is evidenced by the *J. Sousa Contractor Limited* case, *supra*, at paragraph 23 and 24 where the Board, in determining the applicability of the rule, weighed the significance of the fact(s) sought to be contradicted, and whether the issues were “central and not merely collateral” to the substance of the case.

8. The above analysis yields two conclusions. First that the rule in *Browne v. Dunn* is one of fairness and deals with evidence which is intended to be used or could be used to impeach the credibility of a witness on a particular point. Secondly, the applicability of the rule may depend or relate to the significance or the substance of the facts in issue and whether or not it merely relates to collateral facts. [See also the Practice Note accompanying the *Machado v. Berlet* decision, *supra*.]

9. These principals can now be applied to the situation at hand. The evidence which is the subject of controversy in this ruling is evidence of details of conversations that do not contradict any of the evidence given by the complainants *per se*. Instead, it is evidence of aspects of conversations in addition to evidence about those conversations that had been given by the complainants either in their examination or cross-examinations. In other words, if the complainants testified about five facts being discussed in a conversation, this controversial evidence would be with regard to a sixth or seventh detail being added to that conversation. Such details had not be suggested to the complainants during their examination-in-chief. The question now becomes whether any of those details or that evidence would offend the rule in *Browne v. Dunn*.

10. The rule in *Browne v. Dunn* makes it clear that any evidence that is intended to be used and that could be used to impeach the credibility of a witness that had not been brought to the particular attention of that witness when s/he testified should not be introduced by opposing counsel. But the rule does not apply to situations where the evidence is introduced for purposes other than impeaching credibility.

11. Hence, I indicated to the parties that I would apply the rule of *Browne v. Dunn* very strictly to any evidence intended to be used or that could be used to impeach the credibility of the complainants and I would require that particular notice had been given to the complainants in cross-examination of any items that could impeach the credibility of the complainants. Absent such particular notice being given to them when they testified, the respondents would be precluded for introducing any such evidence or relying upon any in later argument.

12. On the other hand, if the evidence the respondents sought to introduce was tendered simply to add details of conversations and was not intended or capable of raising any adverse implications regarding the credibility of the complainants with regard to those details, then the evidence is admissible evidence and does not offend the rule in *Browne v. Dunn*. The introduction of evidence in this way may affect what weight it will be given at the end of the day, but it will not affect

the admissibility of the evidence. It then follows that if the complainants feel it desirable to rebut any of that evidence, they are free to do so in reply.

13. In summary, the rule *Browne v. Dunn* is one of fairness. In seeking to maintain fairness in this case, the Board is very mindful of the fact that the issues in this case occurred a long time ago. Given the complexity of this case and the difficulties in scheduling, a long period of time has passed and great expenses are being incurred by the parties because of the length of the proceedings. However, on balance, it appears that there is a lesser chance of injustice by allowing evidence in at this stage that does not contradict the complainants' case and that simply adds further details. In return, if the complainants choose to call reply evidence, they will be given the appropriate latitude under these circumstances.

3258-90-G Labourers' International Union of North America Ontario Provincial District Council, on behalf of its affiliated Local Unions 183, 247, 491, 493, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089, Applicant v. **Consamar Inc.**, Respondent v. Pipeline Contractors Association of Canada, Intervener

Construction Industry - Construction Industry Grievance - Parties - Teamsters intervening and objecting to applicant's ability to bring grievance - Board noting distinction between trade union which is a party to a collective agreement and trade union which is bound by collective agreement - Board satisfied that applicant not a party to Pipeline Agreement and therefore without status to bring grievance or refer it to the Board under section 124 of the Act - Grievance dismissed

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members J. A. Rundle and J. Redshaw.

APPEARANCES: S.B.D. Wahl, T. Connolly for the applicant; M. D. Sweany for the respondent; N. L. Jesin, B. L. Brown for the intervener.

DECISION OF THE BOARD; May 21, 1991

1. This is a referral to the Board of a grievance in the construction industry, pursuant to section 124 of the *Labour Relations Act*.

2. By letter to the respondent dated March 6, 1991, the applicant has grieved as follows:

Dear Sir:

Re: Labourers' Mainline Pipeline Agreement for Canada Between the Pipeline Contractors Association of Canada and Labourers' International Union of North America effective from 1st of May, 1989 to 30 April, 1991 (the "Collective Agreement"), binding on Consamar Inc.
(the "Employer")

The Labourers' International Union of North America, Ontario Provincial District Council, on its own behalf and on behalf of its Local Unions and its unemployed members (the "Union"), hereby grieves that from on or about February 11th, 1991 and continuing, the Employer has violated the Collective Agreement. Without limiting the generality of the foregoing, in particular Articles I, II, III, IV and V thereof, by failing or refusing to employ only members in good standing of the Union for all work covered by the Collective Agreement specifically the general

labourer's work of assisting the fuel truck driver or drivers at its Northern Ontario Pipeline job sites. At all material times there have been and continue to be unemployed members of the Union who are qualified, ready, willing and available to perform said work for the Employer.

Remedy required:

1. A declaration that the Collective Agreement is binding upon and has been violated by the Employer as hereinbefore set out.
2. An Order that the Employer cease and desist from violating the Collective Agreement.
3. An Order that the Employer employ only members in good standing of the Union for all work covered by the Collective Agreement in accordance with its terms.
4. An Order for damages against the Employer in an amount equal to all wages, benefits, contributions, deductions and remittances that would have been paid or payable to the Union and/or its unemployed members or affiliated organizations, with interest.
5. Such further and other relief as may be appropriate in the circumstances.

This grievance is being referred to Arbitration before the Ontario Labour Relations Board pursuant to Section 124 of the *Act*.

This grievance was referred to the Board on March 8, 1991.

3. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America on behalf of Local 91, 141, 230, 879, 880, 990, 989 ("the Teamsters") has filed an intervention in this proceeding. In it, the Teamsters assert that the grievance is a demand for work which has been assigned to one of its members, and that it raises what is, in essence, a jurisdictional dispute and is, as such, inarbitrable before the Board. In the alternative, the Teamsters submits in its intervention that the grievance ought to be deferred pending the disposition of the jurisdictional dispute. In addition, in a letter dated April 22, 1991, the Teamsters submits that the applicant "is not a party to any collective agreement relevant to these proceedings and therefore, this application ought to be dismissed", and alternatively, that this matter should be adjourned until the Labourers' International Union of North America has been given proper notice of it.

4. At the hearing on April 23, 1991, with respect to this matter, the Board was advised that the applicant's grievance alleges a violation of the Laborers [sic] Mainline Pipeline Agreement for Canada (the "Pipeline Agreement") between the Pipe Line Contractors Association of Canada and the Laborers [sic] International Union of North America (which we take to be the American spelling of the Labourers International Union of North America). The grievance concerns the assignment of work as a "swamper" on a fuel truck to a member of the Teamsters. The applicant alleges that the swamper job for the first fuel truck on the job site in question was assigned to a labourer at a pre-job mark-up meeting on December 3, 1990. Subsequently, when a second fuel truck came to be utilized on the job site, the swamper job associated with it was assigned to a teamster. The applicant alleges that this second assignment was an improper "change" to the December 3, 1990 assignment. In argument, the applicant asserted that the respondent did not have the right to make such a "change", and that by doing so, it violated the Recognition and Security clause of the Pipeline Agreement. We note that the grievance also alleges violations of the Coverage and Definitions, Scope of Work, Notification, Pre-job Conference and Enforcement, and Hiring Procedure clauses.)

5. The respondent employer confirmed that the swamper job assignment came up at a

December 3, 1990 meeting and that the swamper job on the first fuel truck at the job site was assigned to a labourer. However, the respondent asserted that that assignment was made because it had been advised by representatives of the Labourers Union that there was a decision of this Board which supported its claim to the work. The respondent asserted that the "Labourers Union" representatives said that they would provide evidence of this, and evidence that the "Labourers Union" had not accepted a Saskatchewan jurisdictional dispute decision in which swamper work was awarded to members of the Teamsters, but that they failed to do so. In the meantime, the respondent said it had received written submissions from the Teamsters which prompted it to assign the swamper job on the second fuel truck to a teamster. The respondent considered this to be a "new" assignment.

6. At the hearing, the Teamsters did not pursue an argument that the proceeding should be adjourned in order to have the Labourers International Union of North America (the "International") provided with notice (possibly because a representative of the International appeared with counsel and others on behalf of the applicant). It did however, maintain its objection to the applicant's ability to bring the grievance and referred the Board to *Ontario Hydro* [1986] OLRB Rep. Aug. 1137 (the "Franks decision") in that regard. The respondent and the intervener Pipe Line Contractors Association of Canada supported the Teamsters position in that respect. In addition, the Teamsters disagreed with the applicant's characterization of the second swamper job assignment as "change" and argued that the grievance is really a jurisdictional dispute in any event.

7. In the alternative, and while conceding that the Board's practice is to merely defer grievances which are fundamentally jurisdictional disputes pending the disposition of the jurisdictional dispute through the process established therefore, the Teamsters urged the Board to adopt the approach it asserts as prevalent in other North American jurisdictions; that is, to dismiss the grievance herein as being inarbitrable because it is a jurisdictional dispute.

8. In the further alternative, the Teamsters referred to the Board to what it asserts is an agreement between the Labourers International Union of North America and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. It produced a document on the apparent joint letterhead of those two trade unions dated March 19, 1991 which is signed by the General President of each and which reads as follows:

TO ALL REGIONAL OFFICES, CONFERENCES,
DISTRICT COUNCILS AND LOCALS UNIONS
IN THE UNITED STATES AND CANADA

Dear Brothers and Sisters:

Various discussions recently have been held between the officers and staff of the Laborers' [sic] International Union of North America and the International Brotherhood of Teamsters regarding both problems which exist and progress which has been made between our two organizations.

This communication will serve as the notice to all affiliates of both International Unions to reestablish a productive working relationship that historically and traditionally has been recognized. This close working relationship between our memberships can only be beneficial to our mutual, common interest.

Furthermore, this communication specifically reaffirms the Memorandum of Understanding between the Laborers' [sic] and the Teamsters, dated April 22, 1947, as well as the 1970 Memorandum of Understanding, in addition to the September 17, 1980 Committee Understanding. These documents indicate the long cooperative history between the Laborers' [sic] and the Teamsters.

It is further directed that all affiliates are to refrain from referring jurisdictional disputes to the National Labor [sic] Relations Board or Canadian Provincial Labour Relations Boards for resolution. All affiliates will use every possible means to persuade employers not to file jurisdictional disputes with government boards in the United States and Canada.

All jurisdictional disputes must be discussed and hopefully resolved on a local level. Only after local attempts for resolution have failed will such disputes be filed with the International Unions. At that point, representatives from the various Conferences and Regional Offices will be assigned to meet in order to resolve any jurisdictional differences. Failing settlement, the dispute will then be referred to the full jurisdictional committee for resolution.

This, therefore, will serve as a means to develop the cooperation and needed communication between all affiliates.

9. The Teamsters argued that the applicant ought to have followed the procedure established by the agreement between the two Internationals, and that the applicant should not be permitted to proceed with the grievance at least until that procedure, which the Teamsters said it had instituted, had been exhausted.

10. As yet a further alternative, the Teamsters suggested it would be appropriate to follow the approach adopted in *Schindler Elevator Corporation* [1990] OLRB Rep. Oct. 1092 in this matter.

11. The respondent and the intervener Pipeline Contractors Association of Canada adopted these submissions of the Teamsters as well.

12. Finally, the Teamsters indicated that "if forced to do so", it would itself file a jurisdictional dispute complaint with the Board. It also confirmed that it had advised the respondent that it might itself file a grievance if the second swamper assignment was changed.

13. In response, the applicant referred the Board to an accreditation decision in *Pipe Line Contractors Association of Canada and Labourers International Union of North America, Ontario Provincial District Council; the Utility Contractors Association of Ontario, Intervener* in Board File No. 1051-71-R (Aug. 10, 1972, unreported). It argued that the accreditation order made in that decision made this case distinguishable from the Franks decision. The applicant also referred to section 147(3) of the Act in support of its claim to the right to bring the grievance herein. In response to the other arguments, the applicant referred to *Ontario Hydro* [1982] OLRB Rep. Mar. 428 and *Ontario Hydro* [1988] OLRB Rep. Dec. 1303 (application for judicial review dismissed Nov. 15, 1990, reported at [1990] OLRB Rep. Nov. 1204) in support of its argument that the Board should proceed with the grievance arbitration notwithstanding any jurisdictional dispute aspect to it. The applicant denied having any knowledge of the Teamsters instituting proceedings under the agreement between the two Internationals and pointed out that that agreement was signed after this grievance was delivered and referred to the Board (although the Teamsters did allege that that agreement had been entered into on January 31, 1991 even though it was not executed until March 19, 1991). The applicant also submitted that the Board should, at the very least, proceed with the grievance to the extent of determining whether the respondent was able to "change" the swamper work assignment, an approach it argued would be consistent with *Schindler Elevator Corporation, supra*.

14. It appears therefore that, in their final alternative positions at least, the parties agree that the *Schindler Elevator Corporation, supra* approach is applicable to these circumstances. However, the fundamental question is whether the applicant can properly bring this grievance at all.

15. Section 124(1) of the *Labour Relations Act* provides that:

124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

Sections 137(1)(a), (c) and (e), and 147(3) provide that:

137.-(1) In this section and in sections 135 and 138 to 151,

- (a) "affiliated bargaining agent" means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency.

...

- (c) "employee bargaining agency" means an organization of affiliated bargaining agents that are subordinate or directly related to the same provincial, national or international trade union, and that may include the parent or related provincial, national or international trade union, formed for purposes that include the representation of affiliated bargaining agents in bargaining and which may be a single provincial, national or international trade union;

...

- (e) "provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions representing terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(3).

...

147.-(3) Any employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by provincial agreement shall be considered to be a party for the purpose of section 124.

16. In effect, the applicant's argument is that because it is an affiliated bargaining agent bound by a provincial agreement in the industrial, commercial and institutional ("ICI") sector of the construction industry, it is properly considered to be a party for section 124 purposes with respect to other collective agreements by which it is bound as well.

17. In our view, section 147(3) does not assist the applicant. It is clear that sections 137 to 151 apply to the province wide bargaining scheme established by the Act for the ICI sector of the construction industry in Ontario. Section 147 stipulates only that an employee bargaining agency, as defined in section 137(1)(c), or an affiliated bargaining agent, as defined in section 137(1)(a), which is bound by provincial agreement as defined by section 137(1)(e) (that is, one with respect to the ICI sector of the construction industry in Ontario) is a "party" within the meaning and for pur-

poses of grievances under the ICI provincial agreement it is bound by which are referred to the Board pursuant to section 124 of the Act. It does not apply to collective agreements other than provincial agreements within the meaning of section 137(1)(e).

18. Nor does the accreditation decision referred to by the applicant assist it. Notwithstanding that at paragraph 2 of that decision, the Labourers' International Union of North America is referred to as the respondent, it is evident that the respondent was the Labourers' International Union of North America, Ontario Provincial District Council, which is also the applicant herein. At paragraph 7 of that accreditation decision, the Board distinguished between the International and the Labourers' International Union of North America, Ontario Provincial District Council (the "District Council") when it observed that:

The Labourers' International Union of North America has assigned "pipeline jurisdiction" in the Province of Ontario to various locals. These locals have formed the Ontario Provincial District Council which is the respondent in this application.

19. We note also that pursuant to the designation issued by the Minister on September 30, 1983, the International and the District Council are the employee bargaining agency designated to represent in bargaining all construction labourers, including masons, or bricklayers tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work, who are represented by their affiliated bargaining agents in the ICI sector of the construction industry in Ontario. Each of the International and the District Council are individually identified as also being affiliated bargaining agents of that designated employee bargaining agency.

20. It is clear that the International and the District Council are separate and distinct entities, both of which are trade unions within the meaning of the *Labour Relations Act*.

21. In its result, the Board's accreditation decision issued a certificate of accreditation to the Pipe Line Contractors Association of Canada with respect to all employees for whom the District Council, not the International, held bargaining rights in the pipeline sector of the construction industry in the Province of Ontario. Bargaining rights held by the International were not in issue in that proceeding. Nor was the International a party to that proceeding.

22. At page one of the Pipeline Agreement, it is specified that it is an agreement:

BY AND BETWEEN:

PIPE LINE CONTRACTORS ASSOCIATION OF CANADA (hereinafter referred to as the "Association") on behalf of those employers of employees who have appointed or who may appoint the Association as agent for collective bargaining, those employers on whose behalf the Association is accredited or registered as collective bargaining agent and such other employers of employees who may execute an acceptance of the terms and provisions of this Agreement as identified from time to time in Schedule A attached hereto (hereinafter referred to as the "Employer").

AND:

LABORERS [sic] INTERNATIONAL UNION OF NORTH AMERICA (hereinafter referred to as the "Union") and its Local Unions having pipeline jurisdiction in Canada as identified in Schedule B attached hereto (hereinafter referred to as the "Local Union")

Schedule B to the agreement is set out at page 35 of the Pipeline Agreement document as follows:

SCHEDULE B

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA

ANGELO FOSCO, General President
905 - 16th St. N.W., Washington, D.C., 20006
(202) 737-8320

ARTHUR E. COIA, General Secretary-Treasurer
905 - 16th St. N.W., Washington, D.C., 20006
(202) 737-8320

* * * * *

Refer all Job Notifications, Pre-job Conference requests and Local Union jurisdiction inquiries to the following International Representatives:

Ontario, Manitoba, N.W.T. (District of Keewatin):

UGO ROSSINI, 4th Vice-President and Manager,
Toronto Sub-Regional Office
105 - 1210 Sheppard Avenue East
Willowdale, Ontario, M2K 2S5
(416) 496-1110 Fax: (416) 496-8272

Quebec, New Brunswick, Prince Edward Island, Nova Scotia, Newfoundland, Labrador and Baffin Island:

NELL SCIPIONI, Manager
Eastern Canada Sub-Regional Office
101-1177 Belanger Ave.,
Ottawa, Ont., K1H 8N7
(613) 738-3184 Fax: (613)

British Columbia, Alberta, Saskatchewan, Yukon Territory, and N.W.T. (District of Mackenzie):

W.E. HART, Manager
Vancouver Sub-Regional Office
516-1200 W. 73rd Ave.
Vancouver, B.C., V6P 6G5
(604) 261-0241 Fax: (614) 261-0633

1989/91

There is no reference in Schedule B to any "Local Union" of the Labourers' International Union of North America or to the District Council.

23. Further, although Schedule A to the Pipeline Agreement lists the employers bound by it and suggests that the "Ontario Employers" listed are bound by "Accreditation", we are unable to discern a connection between that and the accreditation order issued with respect to the District Council on August 10, 1972 as aforesaid.

24. In the result, there is no reference to the District Council, the applicant herein, in the Pipeline Agreement. This agreement is one by and between the International and the Pipe Line Contractors Association of Canada.

25. Even if the applicant is nevertheless somehow bound by the Pipeline Agreement (which

we seriously doubt, given that no “Local Unions” which might constitute it are named in it), we find the Franks decision to be applicable. In that case, the Board correctly distinguished between a trade union which is a party to a collective agreement and a trade union which is bound by collective agreement, and concluded that a trade union which is not a party cannot bring and refer to the Board under section 124 a grievance under a collective agreement which is not a provincial agreement. At paragraphs 3 and 6 to 8 the Board explained that:

3. In a previous decision, *The International Brotherhood of Teamsters and the Electrical Power Systems Construction Association* [1976] OLRB Rep. Dec. 825, this Board found that the International Brotherhood of Teamsters, a member of the Allied Construction Trades Council was not entitled to bring a grievance under the collective agreement between the Allied Council and EPSCA because on the wording of the agreement that trade union was not a party to the collective agreement and since it was not a party it did not have status to bring a grievance or a section 124 application before the Board. At the time that case was decided, section 124 or 112(a)(1) as it was at that time read as follows:

Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 37, *either party* to a collective agreement between an employer or employers’ organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

[emphasis added]

Subsequently, section 112(a)(1) was amended to changing the words “either party” in the third line to a “a party” and the section continued in that form to the present day. It is to be noted that the amendment to the Act changing the expression “either party” to the expression “a party” would not change the outcome of the previous EPSCA decision referred to since the crux of the finding in that case is that the Teamsters were not a party to the collective agreement.

• • •

6. At the root of the problem in the present case is the distinction between being bound by a collective agreement versus being a party to the collective agreement. From its earliest form the *Labour Relations Act* has recognized that there is a distinction between a party to an agreement and the matter of being binding. See, for example, section 50 of the Act which reads as follows:

A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

There the employer and trade union are parties whereas the employees are bound by the collective agreement.

7. The matter becomes more complex particularly in the construction industry, where the agreements are multi-employer agreements and the union side is frequently a council or certified council of trade union. Thus, for instance, in the provincial bargaining provisions of the *Labour Relations Act* by section 147(3) the problem as to status as a party to a provincial agreement is specifically dealt with:

Any employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by a provincial agreement shall be considered to be a party for the purpose of section 124.

8. In the present case it is clear that the parties to the agreement specifically limited who were parties to that collective agreement as distinct from who are bound by the collective agreement, and having structured their affairs with such a distinction in mind it would not be appropriate for

this Board to interfere with that distinction. The fact that the applicant local may be bound by the collective agreement does not in and of itself make it a party to the collective agreement since that agreement clearly limits the parties to the agreement to EPSCA and the Allied Council. (See also *Ainsworth Electric Limited* [1977] OLRB Rep. July 399).

We note that in the Franks decision the Board specifically considered the effect of section 147(3) outside of the provincial bargaining scheme and found it inapplicable.

26. We are satisfied that the applicant Labourers' International Union of North America, Ontario Provincial District Council is not a party to the Pipeline Agreement and therefore has no status to either bring the grievance herein or refer it to the Board. The grievance is therefore dismissed.

27. In the circumstances, we find it unnecessary to deal with or comment upon the other arguments made by the parties.

0021-90-R Angelo Ganassin, Applicant v. The United Brotherhood of Carpenters and Joiners of America; the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America; the Carpenters District Council of Toronto and Vicinity; Lake Ontario District Council; Western Ontario District Council; Ontario Acoustical and Drywall District Council, and their affiliated Local Unions 18, 27, 38, 93, 249, 397, 446, 494, 572, 675, 785, 1071, 1256, 1316, 1450, 1669, 1946, 1988, 2041, 2050, 2222, 2451, 2486 and 2965, Respondents v. **D-K Construction Ltd.**, Intervener

Construction Industry - Petition - Termination - Whether petition voluntary - Working foreman with supervisory responsibility initiating petition - Employees approached at a time when employer's work activity at a low point - Petitioner acknowledging that he might have expressed to employees hope of being reimbursed for legal fees by employer if termination application successful and employer grateful enough - Board not satisfied that petition expressing voluntary wishes of those who signed it - Application dismissed

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *Michael Horan* and *Angelo Ganassin* for the applicant; *Douglas J. Wray*, *Karl Ball* and *Steve Koehler* for the respondents; *Pamela Yudcovitch* and *Murray Dietrich* for the intervener.

DECISION OF THE BOARD; May 9, 1991

1. At the hearing into this application, counsel for the applicant requested and the Board directed that the name of the respondent be amended to read: "The United Brotherhood of Carpenters and Joiners of America; the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America; the Carpenters District Council of Toronto and Vicinity; Lake Ontario District Council; Western Ontario District Council; Ontario Acoustical and Drywall District Council, and their affiliated Local Unions 18, 27, 38, 93, 249, 397, 446, 494, 572, 675, 785, 1071, 1256, 1316, 1450, 1669, 1946, 1988, 2041, 2050, 2222, 2451, 2486 and 2965".

2. This application was made under section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents carpenters and carpenters' apprentices employed by D-K Construction Ltd. It was unclear from the application whether the applicant was seeking to terminate the bargaining rights for all of the carpenters and carpenters' apprentices employed by the employer in the construction industry, or only those in the industrial, commercial and institutional (ICI) sector of the construction industry. At the hearing, the applicant agreed that its application should properly be limited to the ICI sector and the other parties agreed. Having regard to their agreement, the Board finds that, for the purposes of this application, the bargaining unit affected by the application is:

all journeymen and apprentice carpenters, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario for whom the respondents have bargaining rights with the employer.

The parties agree that the application is timely.

3. The employer filed a list of employees containing the names of seven persons, including the applicant Angelo Ganassin. The union took the position initially that Ganassin was not an employee in the bargaining unit because he exercises managerial functions within the meaning of subsection 1(3)(b) of the Act or, in the alternative, on the date of making of the application he was not at work in the bargaining unit. The union claimed also that Jeff Piotrowski, an apprentice carpenter, should not be on the list because he was not at work in the bargaining unit on the date of making of the application. Employer counsel produced a time record for Piotrowski for that date. After union counsel examined the record, he took the position that the union may have to challenge all of the persons on the list on the grounds that none of them were employed in the bargaining unit on the date of making of the application. While the union's claim that Ganassin did not have status to bring this application was in the nature of a preliminary motion, for reasons given in the hearing, the Board ruled that it would hear all of the evidence respecting whether the petition expressed the voluntary wishes of the employees who had signed it and the evidence respecting the union's challenges to the list and would decide those issues in the appropriate order after hearing the parties' final argument.

4. The applicant, Angelo Ganassin, was the only witness who gave evidence at the hearing. He was a forthcoming, candid and credible witness. The findings of fact herein have been made having regard to Ganassin's evidence and the parties' representations respecting the conclusions which the Board should reach based on that evidence and the Board's jurisprudence on which they relied.

5. When an application is made under section 57 of the Act, subsection 57(3) requires the Board to ascertain the number of employees in the bargaining unit when the application was made and whether not less than forty-five per cent of those employees "... have voluntarily signified in writing ... that they no longer wish to be represented by the trade union, ...". If not less than forty-five per cent of those employees have so signified, subsection 57(3) requires the Board to satisfy itself by means of a representation vote whether "... a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated."

6. The employer classified Ganassin on the list of employees as a working foreman. Three other persons on the list were similarly classified. Ganassin described himself as a carpenter working foreman. He was working foreman on the employer's Mastercut project, one of two projects which the employer had at the time the application was made. Six of the seven persons on the list of employees were working on that project on the date of making of the application. The seventh person, Jeffrey Lehmann, was working on the other project. The Mastercut project had been

started the day before the application was made and Ganassin had been assigned by the employer to supervise it. Ganassin testified about his duties and responsibilities as a working foreman and contrasted them with the duties and responsibilities of the other three persons classified by the employer as working foremen. He testified also about the nature of the work being performed by the five other persons on the Mastercut project.

7. Having regard to the evidence about the work being performed on the date of making of the application at the Mastercut project, including the time card for Jeff Piotrowski for that day, the Board finds that each employee on the list except Piotrowski was employed in the carpentry trade for the majority of his time on the application date. Therefore, the Board finds that, at the time the application was made, there were six persons at work in the bargaining unit, namely, Monte Fitch, Angelo Ganassin, Andreas Kyriakou, Jeffrey Lehmann, Robert Mader and Robert Tonin. Five of those employees signed the petition signifying that they no longer wish to be represented by the union. Therefore, should the Board find that the petition expresses their voluntary wishes, the Board would direct the taking of a representation vote.

8. Ganassin has been employed by the employer as an apprentice carpenter and carpenter for 15 years. As noted already, he is one of four persons whom the employer has classified as working foremen on the list of employees. The others are Monte Fitch, Jeffrey Lehmann and Robert Tonin. They are part of a core group of employees whom the employer tries to keep employed on a regular basis. They are paid the rate for a working foreman under the collective agreement even when not overseeing the work of other carpenters. Whether they function as working foremen depends on the number of projects which the employer has going at any time. Since there were only two projects at the time of this application, Ganassin and Lehmann were the only two actually working as working foremen. The other two were working on the Mastercut project under Ganassin. He was responsible for overseeing their work along with that of the other carpenters and apprentices. At other times, Ganassin has worked on the tools under the supervision of one of the other three working foremen.

9. The employer's working foremen are the only supervisors regularly on site with its employees. They report to the employer's general superintendent. He usually visits a job site twice a week for a couple of hours and, at other times they maintain telephone contact with him four or five times a day. Ganassin and the other working foremen supervise the employer's carpenters and labourers on the projects assigned to them. Carpenters and labourers are the only trades directly employed by the employer on its projects. Supervision performed by the working foremen includes assigning work, checking to see that it is done properly, correcting it if needed and recording and reporting their time and that of their employees. On site, they lay out the job, organize the work to be performed by the carpenters and labourers and order the material for their work. The working foremen keep a weekly costing report and prepare a daily report sheet for their projects, which is submitted weekly to the general superintendent. Depending on the job, that report may record such matters as subcontractor activity, the volume of concrete poured and the amount of lumber used. They do not co-ordinate the work of subcontractors except where it has to be co-ordinated with carpentry work, and then only to advise the subcontractor when he can start work, but they keep the general superintendent informed respecting the comings and goings of subcontractors.

10. The working foremen are not responsible for deciding the number of employees to be assigned to a project, who those employees will be, whether they will work overtime, or when they will be laid off. They are not responsible for discipline or hiring and firing, and they do not make effective recommendations in respect of discipline, hiring and firing. Ganassin has reported employees to the general superintendent when he has been unable to get them to do acceptable work. While, to his knowledge, that has never resulted in an employee being fired, he admitted

that some time such persons were the first to be laid off when work on a project was winding down.

11. The Board is satisfied on that evidence that Ganassin does not exercise managerial functions within the meaning of subsection 1(3)(b) of the Act. That does not end the matter however. The issue is not Ganassin's status. As the Board noted earlier, it is whether the employees who signed the petition were signifying voluntarily that they no longer wish to be represented by the union in their employment relations with the employer. The responsibility for satisfying the Board that they were, rests with the applicant. To that end, Ganassin testified about the origin, preparation and circulation of the petition. His evidence is uncontradicted.

12. Ganassin had held the view for several years that the employer might be able to obtain more of the available work if it did not have to pay "top dollar" to carry certain union sub-trades which he believed the employer was obliged to carry because of its collective bargaining relationships with the union and with the labourers union. He believed that, if the employer did not have to carry the union sub-trades, it would be able to get more of the available work because its costs would be lower. After some employees were laid off in March and the Dalton and Mastercut jobs were the only ones on the books, Ganassin concluded that he would be out of work soon if he did not do something about the union. He decided without prior discussion with other employees in the bargaining unit that he should try and get rid of the union. He obtained legal advice and had the petition prepared by counsel before he discussed it with employees in the bargaining unit.

13. Ganassin met three of the employees at a local bar on the Friday before the start of the Mastercut job. The meeting was not prearranged. Employees were accustomed to meeting there at the end of each week. He had the petition in his car. He told them about it and that he had consulted a lawyer. He told them that he was paying for the lawyer and did not ask them to contribute to the cost. When challenged in cross-examination that he had told employees at the bar that he expected the employer to reimburse him if the application was successful, he acknowledged that he might have said he would expect to get his money back if the application was successful and the employer was grateful enough. Ganassin explained his views about the employer being able to get more work without the union. The employees were concerned that their wages would be cut if they got rid of the union. He told them that, if the employer did get more work, as a group they should be able to negotiate better conditions with the employer or they should be able to do at least as well for wages and benefits as they were doing with the union. He based his expectations on the fact that the employer made benefits available to other employees who were not covered by any collective agreement. He told them that, if their expectations were not satisfied by the employer, they could always get the union back. After that discussion, Ganassin and the employees left the bar together and went to his car where he had left the petition. Ganassin signed it first and then gave it to the others to sign. All three signed it. He got the fifth signature the next day after first giving that employee an explanation similar to the one given to the other three employees.

14. Union counsel contends that Ganassin's role with the petition's origin and circulation would cause the employees to perceive the employer to be involved and, therefore, they would have signed the petition out of a belief that the employer supported it and/or might learn of any refusal to sign it. The Board has acknowledged that there are extra concerns about the voluntariness of a petition when a working foreman with supervisory responsibility for other employees in the bargaining unit has been actively involved in it. The Board expressed its concern in *A. N. Shaw & Sons (Eastern) Ltd.*, [1980] OLRB Rep. Oct. 1347, at paragraph 10 as follows:

In assessing the voluntariness of the statement of desire, we are unable to accept the proposition that Mr. Foley stands in the same position as any other employee in the bargaining unit. Because of his supervisory functions, Mr. Foley's active involvement with the statement of

desire raises concerns which would not exist if he were other than a working foreman. However, we also do not believe that his involvement with the statement of desire must invariably result in a finding that it cannot be given any weight. Rather, *what is required is an examination of all of the surrounding circumstances and an assessment of whether other employees would likely have viewed Mr. Foley as acting on behalf of, or with the support of management, or whether they would likely have perceived him as a bargaining unit employee seeking only to further his own self-interests.*

[emphasis added]

Foley was the only supervisor of Shaw's employees on the project where they were working when they signed the petition. In the unionized part of the construction industry, working foremen like Foley are usually, if not always, part of the bargaining unit. Construction industry employees are accustomed to being supervised by other employees in the bargaining unit who are also members of the same union and would not automatically perceive such supervisors to be part of management or to be more allied in interest with management than with the employees. Recognition of that reality may be what led the Board in *A. N. Shaw, supra*, to acknowledge that the extra concerns raised by Foley's involvement with the petition need not "... invariably result in a finding that [the petition] cannot be given any weight.". In the circumstances of that case, the Board concluded that the other employees who signed the petition "... would more likely have regarded Mr. Foley as acting in what he perceived to be his own interests rather than acting on behalf of management." and found the petition to express the voluntary wishes of the employees who signed it. The Board applied the test described in the emphasized passage of the quotation from *A. N. Shaw* to a petition supporting a section 57 application in *Apex Services*, [1983] OLRB Rep. Jan. 1, paragraph 7, but came to the opposite conclusion in circumstances where two bargaining unit employees, both of whom had exercised supervisory authority over the other employees, originated the petition in support of the application and got the employees to sign it. The different results reflect the different circumstances of each case and the fact that, in the end, the decision whether a petition is or is not voluntary is a factual one.

15. There is no evidence before the Board that the employer has conducted itself in any manner which would likely influence the origin, preparation and circulation of the petition or which would support an inference that the employer has acted to influence the origin, preparation and circulation of the petition. It is clearly a question of whether the employees who signed the petition viewed Ganassin as acting in his own interests or on behalf of the employer. Given the fact that the employer's practice of using working foremen as site supervisors has existed for at least seven or eight years, the employees who signed the petition would have been accustomed to seeing Ganassin and the other working foremen exercise that type of supervision over them and the labourers. In appropriate circumstances, that fact might have led the Board to a similar conclusion to the one reached in *A. N. Shaw, supra*. However, when Ganassin approached the employees to sign the petition, he did so at a time when the employer's work activity was at a low point. Five of the six employees on the list had been scheduled to start on the Mastercut project under Ganassin's supervision the next working day after he asked them to sign the petition. That project was one of the employer's two remaining jobs. Coupled with that, Ganassin acknowledged in cross-examination that he might have expressed to the employees the hope of being reimbursed for his legal fees by the employer if the application was successful and the employer was grateful enough. While his testimony leaves unclear the precise content of his remarks and the Board has not inferred from his testimony that Ganassin was in any way acting with the support of the employer, it would not be unreasonable for the employees to view any remark about hoping to be repaid by the employer as an indication that Ganassin was either acting with the employer's support or, at least, was pursuing the application because he perceived that to be what the employer wanted. In the Board's view, in these circumstances, even if Ganassin was pursuing the application out of his own interests, it

would not be unreasonable for the employees to be concerned that any refusal to sign the petition might become known to the employer and jeopardize their chances of being retained on the remaining work and to sign the petition for that reason rather than because they no longer wish to be represented by the union.

16. Therefore, having regard to all of the circumstances surrounding the origin, preparation and circulation of the petition, the Board is not satisfied in the balance that the petition expresses the voluntary wishes of the employees who signed it.

17. The application is dismissed.

1722-90-G Labourers' International Union of North America, Local 183, Applicant v. D.O.V.V. Construction (c.o.b. Dessmark Construction and/or Siltonwood Development), Respondent

Construction Industry - Construction Industry Grievance - Remedies - Settlement - Board determining that parties had signed binding minutes of settlement and that Board has jurisdiction pursuant to s.124 of the Act to enforce them - Board issuing various declarations and directing employer to comply with minutes of settlement and to pay damages, plus interest

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *J. Kovacs* and *H. Cannon* for the applicant; no one appearing for the respondent.

DECISION OF THE BOARD; May 14, 1991

1. The name of the respondent (or the "employer") is amended to read: "D.O.V.V. Construction (c.o.b. Dessmark Construction and/or Siltonwood Development)".
2. This is a referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act* (the "Act").
3. This matter was originally scheduled to be heard on October 10, 1990. On that date the parties agreed to adjourn the hearing to a date to be fixed by the Registrar. It was rescheduled to be heard on November 20, 1990, however the parties requested on November 19, 1990 that the matter be adjourned *sine die*. This was consented to by the Board by decision dated November 19, 1990. By letter dated February 27, 1991 the applicant requested that the Board reschedule this matter for hearing.
4. At the hearing of this matter on May 8, 1991 no one appeared on behalf of the respondent. In accordance with its usual practice the Board waited until 10:00 a.m. before commencing the hearing. As no one had appeared by 10:00 a.m., we heard evidence from the union to substantiate their claims. No one appeared in the course of the hearing on behalf of the employer.
5. It was the position of the applicant that the subject matter of this grievance had been settled on November 15, 1990. Counsel for the applicant argued that the respondent had signed

binding Minutes of Settlement on that date. The applicant was therefore seeking a declaration that a settlement had in fact been reached on November 15, 1990, and that the respondent had not complied with that settlement. The applicant also requested that the Board issue an order directing the respondent to comply with the Minutes of Settlement.

6. The applicant called Mr. H. Cannon, the Contribution Control Officer for the union to give evidence. Mr. Cannon testified that on November 15, 1990 he met with representatives of the respondent, Mr. Tony Mazzei and Mr. Doady Odorico. This meeting took place at the offices of the respondent. At this meeting, Minutes of Settlement for the grievance were signed. They stated as follows:

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

FILE NO. 1722-90-G

BETWEEN:

Labourers' International Union of North America, Local 183

("the Union")

- and -

D.O.V.V. Construction (c.o.b. Dessmark Construction and/or Siltonwood Developments)

("the Employer")

MEMORANDUM OF SETTLEMENT

WHEREAS the parties hereto desire to fully and finally resolve all matters related to the Union's grievance dated October 1, 1990;

NOW, THEREFORE, the parties agree, each with the other, as follows -

1. The employer acknowledges that it is bound to the Collective Agreement effective between the 15th day of May, 1989 and the 30th day of April, 1991.
2. The Employer acknowledges that it violated the Collective Agreement by failing to make required remittances in the amount of seven per cent (7%) of the gross amount payable to W. Framing Ltd. for work performed by W. Framing Ltd. on the "Labour Council" project located at or near the intersection of Yonge St. and Weldbrick St. in Richmond Hill ("the project").
3. The Employer agrees to pay forthwith to the Union the amount equivalent to seven percent (7%) of the amount payable to W. Framing Ltd. for work performed by W. Framing Ltd. at the project.
4. The parties agree that the amount payable by the Employer to the Union is 11,432.44.
5. Upon receipt of \$11,432.44 from the Employer, the Union agrees to withdraw its grievance dated October 1, 1990.

Dated AT TORONTO THIS 15th DAY OF NOVEMBER, 1990.

"Doady Odorico"
FOR THE EMPLOYER
DOADY ODORICO

"Hugh Cannon"
FOR THE UNION
HUGH CANNON

Mr. Cannon signed the Minutes on behalf of the union and witnessed Mr. Odorico sign on behalf of the employer.

7. At this meeting on November 15, 1990 Mr. Odorico admitted that the respondent was bound to a collective agreement between the Labourers' International Union of North America, Local 183 and D.O.V.V. Construction (c.o.b. Dessmark Construction and/or Siltwood Development). Mr. Odorico also admitted that he was in violation of this collective agreement, and the parties agreed that the damages set out in the Minutes of Settlement \$11,432.44, were appropriate. To the date of the hearing, the union has not received the agreed to damages.

8. Counsel for the union argued that the Board, if it found a settlement to have been concluded, had the jurisdiction to direct the respondent to implement the settlement. In support of this position counsel supplied the Board with two decisions, *Suss Woodcraft Ltd.*, [1983] OLRB Rep. April 600, and *Perfection Rug Co. Ltd.*, [1984] OLRB Rep. Jan. 68.

9. In *Suss Woodcraft Ltd.*, (*supra*) the Board was dealing with a situation similar to the one facing the Board in this case. In assessing whether it could direct the respondent to comply with the settlement, the Board canvassed the relevant arbitral jurisprudence and stated:

...

7. The Board in a section 124 referral is acting in the place of an arbitrator, and Mr. Nyman for the applicant has brought to the Board's attention considerable arbitral jurisprudence for his position that an arbitrator can order the implementation of a settlement reached under the collective agreement. In *The Corporation of the Town of Scarborough* (unreported), released May 23, 1978 (Brandt), the employer's Board of Control met with the union to discuss a grievance, and at the conclusion of the meeting passed a resolution upholding the grievance and awarding the grievor the transfer which he sought. At a subsequent meeting, the matter was re-opened and the Board passed a resolution reversing its decision. The Board of Arbitration unanimously found that the initial action of the Board of Control constituted a decision which in effect resolved the grievance between the parties, and wrote, at page 4 of its award:

"...for the purposes of the orderly and final resolution of disputes arising between the parties to a collective agreement a decision of [the employer] once reached must be treated as final and as one which the parties to the agreement can rely on as representing the disposition by the [employer] of an outstanding matter. Were it otherwise there would be no finality to the grievance procedure. This would not be conducive to the orderly administration of the collective agreement.

The consequence of settlement of a grievance in the grievance procedure is to render inarbitrable that grievance or any subsequent grievance which raises the same issue. In *Re City of Sudbury*, 1965 15 L.A.C. 403 (Reville) the following quotation from *Re Mueller Limited* 1961 12 A.C. L.A.C. 131 (Reville) was approved:

The grievance procedure is designed to provide members of the bargaining unit and the union with a method of orderly processing their respective grievances. In order to avoid the expense inherent in the arbitration process the procedure provides for bona fide efforts to be made by the grievor and management to settle the dispute at various stages and at various levels. It follows, therefore, that if the grievor and/or the Union actually or impliedly accepted the decision of management they should not be allowed to have second thoughts on the matter and re-process essentially the same grievance at a later date. If this were to be allowed, management would never know whether, in fact, its decision had been accepted by the individual grievor or the union representing him, and management would be plagued and harassed in what would be a plain abuse of the grievance procedure.

It may equally be said of this case that the Union must be in a position to know that decisions

arrived at by management can be relied on as constituting a final disposition of a matter in dispute and not subject to reopening at a later time.

The Board then concluded:

In the result the grievance is allowed and the Corporation is directed to implement the decision of the Board of Control.

8. In *Canadian International Paper Company* (unreported), released May 22, 1982 (Brunner), the arbitrator found as a fact that a grievance had been settled orally at a meeting between the company and the union. The union witnesses, whom the arbitrator found to have a much better recollection of the meeting than the company witnesses, provided the following account:

"... The matter was then reviewed and reference was made by Connors to the fact that over one year's back pay was at issue. Amounts, of \$1,000 and \$1,500 were mentioned. Timmouth suggested that the payroll records would have to be perused to ascertain the exact number of hours that were involved. To this Connors replied that he would be satisfied with whatever amount Timmouth agreed was 'sufficient to cover the damage'. Timmouth then asked whether Batten and Bucking were the only employees with similar grievances. Connors after 'looking around' the room stated that they would be the only two grievors if 'we can consider the matter resolved'. To this Timmouth replied 'you can consider the matter resolved and I will check the payroll cards'.

After reviewing the authorities in support of the proposition that evidence of settlement discussions is admissible and necessary to prove that a settlement has been made, the arbitrator concluded:

"I find that the terms of the settlement were that Batten and Bucking were to be paid at the level H hourly rate set forth on p. 28 of the Collective Agreement for each hour they had worked on or after April 1, 1979 as Lead Hands."

and directed as follows:

"... the grievance must be allowed and a declaration that a settlement agreement in the terms already noted was entered into on July 4, 1980 is issued. The Company is directed to forthwith implement the settlement and pay Batten and Bucking for all hours worked by them as Lead Hands between April 1, 1979 and June 25, 1980, at the then prevailing level H hourly rate for the single Service division less whatever amounts they were paid at their scheduled occupational rates."

9. *Bittner Packers Limited* (unreported), released January 27, 1982 (Betcherman), also cited by Mr. Nyman, is a case perhaps more directly related to the applicant's alternative argument, but recognizes a principle of finality similar to the two previous cases. The company had admitted liability in the course of grievance discussions, but no "settlement" of the remedy, in terms of a payment of damages, had ever been arrived at. The arbitrator wrote at page 5:

"... I find it to be a clear and unequivocal admission by a person in authority that the union's interpretation of Article 1.03 was correct and that the company had breached the article by using part-time employees where it was possible to use full-time employees.... Thus it is my finding that the company clearly admitted its liability and it cannot retract its admission at this stage: see *re Air Canada and Canadian Air Line Employees' Association*, (1980), 27 L.A.C. (2d) 405 (Weatherill)."

The arbitrator then went on to deal with the outstanding issue of damages.

10. In the present case, all aspects of the union's claim are said to have been settled. The settlement was not in writing, but as the *Canadian International Paper Company* case, *supra*, shows, that is simply a matter of proof. Here there was no evidence called by the respondent to refute the sworn testimony of Mr. Cartwright, and the Board has no difficulty concluding that an oral settlement was reached for the payment of \$1,000 to the union.

11. The company is accordingly directed to pay the amount of \$1,000.00 to the union forthwith.

10. In *Perfection Rug Co. Ltd.* the Board after citing *Suss Woodcraft Ltd.*, also concluded that it had jurisdiction under section 124 of the Act to enforce an oral settlement of a grievance.

11. The Board finds therefore that the parties to the grievance before us signed binding Minutes of Settlement on November 15, 1991 and that we have jurisdiction pursuant to section 124 of the *Labour Relations Act* to enforce these Minutes of Settlement.

12. The Board hereby:

1. declares that the respondent is bound to the collective agreement between Residential Framing Contractors Association of Metropolitan Toronto and Vicinity Inc. and Labourers' International Union of North America, Local 183 effective May 15, 1989 to April 30, 1991;
2. declares that the respondent has violated the collective agreement by failing to make required remittances in the amount of seven percent (7%) of the gross amount payable to W. Framing Ltd. for work performed by W. Framing Ltd. on the "Labour Council" project located at or near the intersection of Yonge St. and Weldbrick St. in Richmond Hill ("the project");
3. declares that the respondent and the applicant signed Minutes of Settlement dated November 15, 1991;
4. declares that the payment of damages agreed to in the amount of \$11,432.44 has not been made by the respondent, contrary to the Minutes of Settlement;
5. directs the respondent to comply with the Minutes of Settlement and pay to the applicant \$11,432.44 as damages; and
6. directs the respondent to pay interest on \$11,432.44 from the date November 15, 1990, such interest to be calculated in the manner described in Practice Note 13 dated September 8, 1980.

13. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

0332-90-U Ontario Nurses' Association, Complainant, v. George St. L. McCall Chronic Care Wing of the Queensway General Hospital, Respondent

Change in Working Conditions - *Hospital Labour Disputes Arbitration Act* - Unfair Labour Practice - Employer failing to pay annual wage increase - Employer arguing that annual wage increases previously paid were product of negotiating process through employee-management committee, which process could not continue after certification - Board finding that clear pattern of wage increases had emerged prior to certification and that employer should have paid annual increase in accordance with established pattern - Freeze complaint upheld and compensation ordered - Board dismissing complaint alleging that failure to pay annual wage increase intended to penalize nurses for exercising rights under the *Act*

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

APPEARANCES: *D. Nicholson*, *E. Gaudet*, *R. Ahee* for the complainant; *R. J. Charney*, *R. N. Nero*, *G. Peppiatt*, *M. M. Bouillon* for the respondent.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER H. PEACOCK;
May 14, 1991

1. This is a complaint to the Board, under section 89 of the *Labour Relations Act*, in which the complainant trade union alleges that the respondent employer has acted in a manner contrary to the "freeze" provisions of section 13 of the *Hospital Labour Disputes Arbitration Act* (the "HLDAA") and section 79 of the *Labour Relations Act* (the "LRA"), and also contrary to section 66 of the LRA.

2. By decision dated January 23, 1991 (reported at [1991] OLRB Rep. Jan. 18) the Board disposed of the respondent's challenges to the Board's jurisdiction to deal with this complaint.

3. In the course of the proceeding, there was some suggestion that the complainant had not set out the respondent's name quite correctly (for example, the evidence suggest that the words "Chronic Care" no longer appear in its name). However, there is insufficient information before the Board in that respect to cause us to amend the respondent's name.

4. The respondent is a chronic care facility operated by Extendicare Hospital Management and Development Ltd., a wholly owned subsidiary of Extendicare Health Services Inc., on behalf of the Queensway General Hospital. It provides care for people whose medical condition has stabilized but who require on-going treatment or attention. Some 85 per cent of its patients are over the age of 75.

5. On September 8 and October 31, 1989 respectively, the complainant trade union was certified as the exclusive bargaining agent for two bargaining units of employees of the respondent: one consisting of full-time registered and graduate nurses employed in a nursing capacity and another consisting of part-time (employed for not more than 24 hours per week) registered and graduate nurses employed in a nursing capacity, save and except Head Nurses and those above the rank of Head Nurse (hereinafter "members of the bargaining units"). Since then, the parties have set about bargaining for a first collective agreement pursuant to the provisions of the HLDAA.

6. The complainant alleges that the respondent has wrongfully refused to pay a wage increase which it asserts the members of the bargaining units as aforesaid reasonably expected and were entitled to.

7. The respondent began its operations in November, 1984. At the outset, the respondent established the wage rate it would pay to its registered and graduate nurses by reviewing the "ONA agreement" in effect at the time and the wages being paid to registered and graduate nurses by a number of hospitals, including the Queensway General Hospital. This so called "ONA agreement" is the central collective agreement negotiated between the Ontario Nurses Association and a number of hospitals which participate in a centralized bargaining process. In order to be competitive with other hospitals and in order to compensate the nurses for the somewhat lesser benefits that they were going to receive, the respondent determined that it would pay its registered and graduate nurses a wage rate equivalent to the then ONA rate plus five cents per hour ("ONA plus 5"). In addition, the respondent established a joint employee- management committee.

8. During subsequent years prior to certification as aforesaid, this employee-management committee met regularly throughout the year and with increasing frequency in the months immediately preceding April 1 of each year, that being the date fixed for changes to the compensation package received by its registered and graduate nurses.

9. The evidence discloses that the employee- management committee discussed a broad range of operations and employment issues. It certainly did not restrict itself to discussing wages and benefits.

10. With respect to wages and benefits, it developed that each year the nurses, through their representatives on the committee, would request wage increases in excess of the increase which would have maintained their wages at ONA plus 5, together with certain improvements in benefits. Each year prior to certification, the respondent awarded a wage increase which maintained the nurses wage rates at ONA plus 5 effective, and if necessary retroactive to, April 1 of each year. There was no similar apparent pattern to the adjustments made to the benefits received by the nurses.

11. The respondent did not award a wage increase which would have kept the members of the bargaining units at a wage rate of ONA plus 5 effective April 1, 1990. It took the position, both at the time and before the Board in this proceeding, that doing so was both not required and would constitute a breach of sections 13 and 79 of the HLDAA and LRA respectively. The respondent argued that the annual wage increase previously paid to members of the bargaining units was a product of the negotiating process engaged in through the vehicle of the employee-management committee, which process could not continue after certification. The respondent argued that the members of the bargaining units were well aware of this negotiation process and that the annual wage increases they received were a product of it.

12. As we pointed out in paragraphs 9 and 10 of our January 23, 1991 decision herein, section 13 of the HLDAA and 79 of the LRA operate together to prohibit an employer to which the HLDAA applies (which the respondent is) from altering working conditions (which include all terms and conditions of employment, including wages) in the circumstances set out therein. These are what are commonly known as "freeze" provisions. The purpose of these provisions is to provide a fixed and stable point of departure for collective bargaining, and to thereby facilitate the collective bargaining process, by maintaining the terms and conditions of employment for bargaining unit employees in the pattern which existed at the time the freeze provisions came into effect. This ensures a fixed basis for negotiations and precludes any unilateral alteration to the *status quo* which might give one party an unfair advantage in bargaining or for propaganda purposes.

13. Although the "freeze" label has stuck, it is a bit of a misnomer. Sections 13 and 79 of the HLDAA and the LRA respectively do not necessarily contemplate a static situation. As the Board's jurisprudence demonstrates, it is the pattern that existed prior to the onset of the freeze

and the reasonable expectations of employees which are preserved, not merely the terms and conditions of employment in effect at the point in time that the freeze provisions come into effect. As such, section 13 of the HLDAA and section 79 of the LRA are strict liability provisions in the sense that an employer's actions need not be necessarily improperly motivated for it to be in breach of them (see *Beaver Electronics Ltd.* [1974] OLRB Rep. Mar. 120, *The Wellesley Hospital* [1976] OLRB Rep. July 364, *Kodak Canada Ltd.* [1977] OLRB Rep. Aug. 517).

14. The Board has interpreted the freeze provisions in a manner which recognizes an employer's right to continue to manage its operations in accordance with a pattern which has been established prior to the freeze being triggered. This "business as before" approach was articulated and applied in *Spar Aerospace Products Limited* [1978] OLRB Rep. Sept. 859. As subsequent cases demonstrate, it is not always easy to apply this test. Nor does applying it always lead to an obvious result. In that respect, for example, the Board has found that the freeze provisions do not prohibit first time events (see *Grey Owen Sound Joint Homes for the Aged* [1983] OLRB Rep. Apr. 522 where lay-offs occurred for the first time during the freeze; *Corporation of the Town of Petrolia* [1981] OLRB Rep. Mar. 261 where work was contracted out for the first time during the freeze). To clarify the business as before approach, and to accommodate first time events, the Board developed the "reasonable expectations" test. Although reasonable expectations language had appeared in prior decisions, the first complete articulation of the reasonable expectations test is found in *Simpsons Limited* [1985] OLRB Rep. Apr. 594, where, at paragraphs 32 and 33 the Board explained that:

32. Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. See, for example, *Corporation of the Town of Petrolia*, *supra*; *Scarborough Centenary Hospital*, *supra*; *Oshawa General Hospital*, *York-Finch Hospital*, *supra*; *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); *AES Data Limited* [1979] OLRB Rep. May 368. In the latter case, for example, the Board found that the employer was entitled to re-assign job functions since the employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. Thus, in the Board's view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instance case, the Board is expressly articulating the test.

33. The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The reasonable expectations test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur everyday. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would reasonably expect such an occurrence during the freeze. The Board in *Simpsons*, [[1985] OLRB Rep. 469] although the cleaning was contracted out before the company itself took over that operation, did not conclude there was such a pattern.

15. Many of the cases in the Board's freeze jurisprudence involve the payment, or, more often, the non-payment of wage increases. The Board has consistently found that a failure to pay a wage increase in accordance with a past practice or a promise to do so constitutes a breach of section 13 of the HLDAA or section 79 of the LRA, as the case may be (see, among others, *Scarborough Centenary Hospital* [1969] OLRB Rep. Jan. 1049, *Spar Aerospace Products Limited*, *supra*, *Lennox and Addington County General Hospital* [1978] OLRB Rep. Sept. 843, *Public Service Alliance of Canada* [1978] OLRB Rep. Sept. 854, *St. Mary's Hospital* [1979] OLRB Rep. Aug. 795, *Town of Meaford* [1981] OLRB Rep. Sept. 1202, *Homewood Sanitarium of Guelph, Ontario, Ltd.* [1982] OLRB Rep. Feb. 230, *Sisters of St. Joseph of the Diocese of London* (Board File No. 0782-89-U, Nov. 22, 1989, unreported).

16. The respondent argued that the instant case is distinguishable from those which have come before it because of the negotiated basis for the annual wage increases paid to members of the bargaining units prior to certification. The respondent also submitted that, because it is tied to the ONA rate applicable at the time, the complaint constitutes an attempt to raise the point of departure for the collective bargaining process between the parties, and is therefore contrary to the purpose of the freeze provisions.

17. There is no doubt that certification alters the legal regime between an employer and its employees. For one thing, an employer is obliged to bargain collectively with a certified trade union and to make reasonable efforts to make collective agreement with that trade union. Concomitantly, an employer is prohibited from dealing directly with bargaining unit employees with respect to matters relating to employment. One of the things which makes the application of the freeze provisions difficult is this transition from an individual contract of employment regime to a collective bargaining regime. However, as the pointed out in *Spar Aerospace Products Limited*, *supra* (at paragraph 18), the pattern which is preserved by the statutory freeze provisions is the one established by dealings between an employer and its employees, whether individually or as a group. In our view, the mere fact that the respondent has historically paid its nurses wage increases after the matter was raised at the employee-management committee it had unilaterally established does not mean either that no pattern was established, or it is immune to the freeze provisions of the HLDAA and the LRA.

18. In this case, a clear pattern had emerged prior to certification. Effective April 1 of each year, the same day registered and graduate nurses covered by the ONA central agreement received a wage increase, the respondent's nurses were awarded a wage increase which maintained their wages at 5 cents above the rate in the ONA agreement; that is, at ONA plus 5. We are satisfied that while the nurses' representatives on the employee-management committee always asked for more, they did not expect to receive any more or any less than the increase necessary to maintain their wage rate at ONA plus 5. Indeed, the evidence suggests that, unlike benefits, there was little, if any, real discussion on the question of the annual wage increase. It may not have been quite so simple as the nurses' representatives suggesting an increase in excess of ONA plus 5 and the respondent replying that the increase would be to ONA plus 5, but it was close to that. In our view, the members of the bargaining units reasonably expected that they would receive a wage increase effective April 1, 1990 which would have maintained their wages at the rate paid to ONA nurses at the time plus five cents per hour, and that the respondent should have paid them that increase in accordance with its established pattern of doing so.

19. Nor are we persuaded by the respondent's argument that it would be inappropriate to either find that the respondent was in breach of the freeze provisions, or to make the remedial order requested by the complainant in that respect because it would raise the point of departure for collective bargaining. We note that a similar argument was advanced by the respondent in *Coca Cola Ltd.* [1989] OLRB Rep. May 427. Although the Board in that case dismissed a complaint that the respondent had breached section 79 of the LRA, it was not on the basis of that argument. In any event, the facts in that case make it readily distinguishable from the complaint before us.

20. We note that the respondent's argument in this latter respect would apply to any change in working conditions which could be said to be an "improvement" over those in effect at the outset of the freeze. That suggestion has (implicitly if not expressly) been rejected by the Board. The Board has consistently found that the failure of an employer to pay a wage increase or otherwise continue with or institute an improved working condition during the statutory freeze, in accordance with a pre-existing pattern or a promise to do so, constitutes a breach of the freeze provisions. Collective bargaining does not occur in a vacuum. In our view, it is both contemplated by

the legislation and appropriate that the basis for collective bargaining be the pattern of the employment relationship, and the resulting reasonable expectations of employees, including any pattern or expectation of wage increases.

21. We therefore find that the respondent breached section 13 of the HLDAA and section 79 of the LRA by failing to pay its registered and graduate nurses in the bargaining units represented by the complainant a wage increase effective April 1, 1990 which would have resulted in their being paid at a wage rate equivalent to that paid to such nurses under the then ONA central collective agreement plus five cents per hour (i.e., "ONA plus 5").

22. The complainant also alleged that the respondent wrongly refused to pay the members of the bargaining units a week-end premium rate since April 1, 1990. The evidence reveals that such a week-end premium was discussed in 1989. The respondent refused to implement such a premium in 1989 but indicated it would consider the question in 1990. In the interim, of course, the complainant was certified as the bargaining agent for the nurses to whom such any such premium would have been paid. We are not satisfied either that there was any practice or pattern of paying a week-end premium rate to nurses, or any promise to do so in 1990, such that the nurses could reasonably have expected to receive it on either April 1, 1990 or otherwise. The complaint in that respect is therefore dismissed.

23. Finally, the complainant alleges that the respondent conduct constitute a breach of section 66 of the LRA. Section 66 of the LRA provides that:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

24. The complainant argued that the respondent refused to pay the April 1, 1990 wage increase because, in part, at least, the nurses have exercised their right under the LRA to select the complainant trade union as their collective bargaining representative. In other words, the complainant alleged that the respondent intended to penalize the nurses for exercising their rights under the LRA. There is no evidence before the Board which suggests that the respondent's actions were improperly motivated as alleged by the complainant. In our view, the respondent's actions were based on an honest, albeit incorrect, belief that it was not required to pay the April 1, 1990 wage increase. The complaint in that respect is therefore dismissed.

25. In the result, the Board:

- (a) declares that the respondent has breached section 13 of the *Hospital*

Labour Disputes Arbitration Act and section 79 of the *Labour Relations Act*;

- (b) orders the respondent to forthwith pay to all members of the bargaining units represented by the complainant at a wage rate equivalent to that in the ONA central collective agreement effective April 1, 1990 plus five cents per hour, retroactive to April 1, 1990;
- (c) all persons entitled to retroactive payments in accordance with the above are entitled to be paid interest thereon, such interest to be calculated in accordance with Board Practice Note No. 13.

26. We shall remain seized with this matter for the purpose of dealing with any difficulties encountered in implementing the Board's decision herein for a period of ninety days from the date hereof.

DECISION OF BOARD MEMBER JAMES A. RONSON; May 14, 1991

1. We have been asked by the complainant union to find a practice or pattern whereby the Respondent employer and its nurse employees have surrendered bargaining over the nurses' wages to the Queensway General Hospital and the Ontario Nurses' Association respectively. To make such a finding the evidence should be strong and clear in support. Unfortunately for the union, it is not.

2. The evidence is clear that the employer and its nurses bargained over wages *and benefits* at all times. There is no evidence to show what might have happened if the nurses were adamant in their demands that benefits be increased no matter the effect on their wages. And at no time did the nurses ever get all that they wanted. To the contrary, the undisputed evidence is that the employer always considered the cost of the total package of demands before telling the nurses what it was willing to do.

3. Now there is in place a collective bargaining regime which can lead to binding arbitration if the parties cannot agree. By setting the minimum wage increase in the new contract according to the best formula that the nurses were able to obtain previously, I fear that the Board has severely restricted the employer's ability to bargain over the rest of the contract (not to mention the problems it may cause an arbitrator in the future). If bargaining is a "give and take" process, then the employer's ability to "take" has been compromised.

4. I would preserve the normal pattern of collective bargaining by dismissing this complaint.

0350-91-U Hickeson-Langs Supply Company, Applicant v. Teamsters Local No. 419 and Sam Scrivo, Gary Sloan, Ron Scott, Nick Tarasco, George Fyfe, Ian Quin, Dan Holland, Paul White, Armand Lamonday, Wayne Hebert, Gerry Dault and Clay Bowring, Respondents

Remedies - Strike - Collective agreement providing that it shall not be a violation of the agreement for employees to refuse to cross a picket line established in support of a lawful strike - Employees refusing to cross - Whether "strike" within meaning of the Act - Collective agreement not authorizing violation of the Act - Board rejecting argument that employees acting without collaboration and out of fear for personal safety - Board declaring, *inter alia*, that strike unlawful and issuing cease and desist order and other remedial directions

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *Jason Hanson, Larry Hargreaves, N. Patriarca, B. Fluery and R. Stuart* for the applicant; *T. Hawtin, Sam Scrivo, Armand Lamonday, David Watson and Tom Fraser* for the respondents.

DECISION OF THE BOARD; May 10, 1991

I

1. This is an application under section 92 of the *Labour Relations Act* alleging that certain employees of the applicant have engaged in an unlawful strike, and that the respondent union and its officials have authorized, counselled, encouraged, procured or supported that strike. It is also alleged that those union officials have engaged in acts which they know (or should have known) would result in an unlawful work stoppage. All of these actions are said to be contrary to sections 72, 74, and 76 of the *Labour Relations Act*. The work stoppage occurred when the respondent employees, members of Teamsters Local 419, refused to cross a picket line established at their place of work, by fellow members of Local 419 who work for "Oshawa Foods".

2. The respondent union and employees do not dispute that quite a number of employees (including the respondents) have not reported for work when scheduled to do so. Nor do the respondents dispute that this work refusal was triggered by the presence at the company's premises of a picket line mounted by fellow members of Local 419 who are currently engaged in a lawful strike against Oshawa Foods. The respondents contend, however, that their refusal to cross the picket line was not a "strike" within the meaning of the Act because:

- (1) it was the product of *individual* employee decisions taken without consultation or collaboration with other employees;
- (2) it reflects each *individual* employee's judgement that it was unsafe to cross the picket line to go to work; or, in the alternative,
- (3) it reflects each respondent employee's individual understanding that pursuant to Article 8.02 of the collective agreement no work was required in these circumstances.

Articles 8.01 and 8.02 of the agreement read as follows:

ARTICLE 8.00 - STRIKES AND LOCKOUTS

8.01 - The Union agrees that there shall be no strike and the Company agrees that there shall be no lockout during the term of this Agreement.

8.02 - *It shall not be a violation of this Agreement*, however, for the employees covered hereunder to refuse to cross a picket line established in support of a lawful strike.

[emphasis added]

3. The relevant “unfair labour practice” provisions of the Act are as follows:

72.-(1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

- (a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 113(3) to have released to the parties the report of a conciliation board or mediator; or
- (b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 113(3) to have released to the parties a notice that he does not consider it advisable to appoint a conciliation board.

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

• • •

* * *

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

* * *

76.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

Also relevant are sections 1(1)(o) and 42:

1.-(1) In this Act,

• • •

- (o) “strike” includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

* * *

42.-(1) Every collective agreement shall provide that there will be no strikes or lock-outs so long as the agreement continues to operate.

(2) If a collective agreement does not contain such a provision as is mentioned in subsection (1), it shall be deemed to contain the following provision:

“There shall be no strikes or lock-outs so long as this agreement continues to operate.”

II

Background

4. In accordance with its usual practice, the Board directed the abridgement of the time limits for filing pleadings, and put the matter on for hearing quickly. Vice-Chair O’Neil said this:

1. This is an application under section 92 of the *Labour Relations Act*. The applicant employer asserts that the respondents are engaging in an unlawful strike. We feel it would be useful to reiterate what the Board wrote in its unreported decision between the same parties on November 15, 1988, *Hickeson-Langs Supply Company*, Board File 1952-88-U as follows:

1. ...

If, as the applicant asserts, there is a collective agreement in existence, there is little doubt any strike would be unlawful. The Ontario *Labour Relations Act* absolutely prohibits any work stoppage during the currency of a collective agreement.

2. In a recent case involving Teamsters Local 647 and Monarch Fine Foods Limited (see: *Monarch Fine Foods Limited*, [1986] OLRB Rep. May 661) the Board emphasized, once again, that the parties to a collective agreement are prohibited from engaging in a strike or lockout during the term of a collective agreement and prior to completion of the compulsory conciliation process. The Board observed that in the event of an unlawful strike, an employer is entitled to seek a variety of remedies:

- (1) Under section 92 an employer can seek a cease-and-desist order enforceable in the Supreme Court of Ontario as an Order of that Court. Disobedience can result in fine or imprisonment.
- (2) An employer may seek damages at arbitration for any lost profits.
- (3) An employer can discipline employees who engage in unlawful concerted activity because engaging in a strike is a serious breach of their employment obligations which warrants at least discipline and, in the view of some arbitrators, discharge. (See for example: *Re Oshawa Group Ltd. and Teamsters Union Local 419* (1988), 33 L.A.C. (3d) 97 where the arbitrator upheld a 14-day suspension with consequent loss of pay for an employee engaging in an illegal strike. See also the unreported decision of Michel Picher involving the same parties released June 30, 1988.)
- (4) The employer may seek consent to prosecute and subsequently prosecute employees or the trade union for their breach of the law. A strike is not just a private protest. It is contrary to the *Labour Relations Act*. A successful criminal prosecution may result in fines of up to \$1,000 per day for employees and \$10,000 per day for the Union. [Now \$2,000 and \$25,000 respectively.]

In this case the employer seeks a cease-and-desist direction under section 92, and a declaration that anyone violating the direction sought may expose himself to committal, fine, or criminal prosecution for an indictable offence as well as a declaration by the Board that Articles 8.02 and 8.03 of the collective agreement between the applicant and Teamsters' Local 419 are void.

2. In unlawful strike applications, expedition is important - particularly when it is said that the strike is ongoing at the time the application is made and there is the possibility of serious economic disruption to the employer's enterprise. Accordingly, the Board is satisfied that it is necessary in the public interest that the time for the filing of the replies and for the service of notices of hearing be abridged, and hereby so directs. The replies of the respondent may be filed with the Board at any time prior to the hearing. This matter is hereby set down for hearing at 1:30 p.m. on Thursday, May 2, 1991, at the Board's offices at 400 University Avenue, Toronto, M7A 1V4.

5. The Board's reference to the company's earlier complaint is no coincidence. These parties are no stranger to the Board, or to the problem of unlawful strikes. In November 1988 the company also complained that employees were engaging in an unlawful strike. That proceeding was ultimately adjourned on the basis of this undertaking from Local 419:

"The union agrees to take reasonable steps to prevent unlawful strikes at the employer's Toronto Branch premises and to take reasonable steps to end unlawful strikes should such strikes occur".

As a result of the work stoppage in November 1988, the company disciplined all but one of the employee respondents in the present case.

6. Nor was the 1988 proceeding the only one which the company felt obliged to launch in order to ensure compliance with the "no strike" obligation in the *Labour Relations Act* and the parties' collective agreement. In September 1985 the company filed a similar complaint of an unlawful strike naming, *inter alia*, George Fyfe, Ronald Scott, and Sam Scrivo who are also respondents in the present proceeding. That complaint resulted in both a declaration that the employees were engaged in an unlawful strike at the company's warehouse at 500 Fenmar Drive, and a direction that they forthwith cease and desist from engaging in that unlawful strike.

7. There has been a history of work stoppages involving both the respondent union, and at least some of the respondent employees in this case; moreover, in late April 1991 the company (correctly) anticipated further problems if the Oshawa Foods workers went on strike and decided to post pickets at the company's Fenmar Drive location. Accordingly, on April 27, 1991 the company reminded the union, in writing, of its obligations flowing from the 1988 proceeding and the undertakings that its officials had given, and which were recorded in the Board's 1988 decision. The company also posted the Board's 1988 decisions by the employee time clock, so that they too would be reminded that any work stoppage is unlawful at this time.

8. Tom Fraser, the secretary treasurer of Local 419, assured the company that there would be no difficulties even if the workers at Oshawa Foods went on strike. He said that he would "pass the word" to the stewards at Oshawa Foods, and that he would make sure that there was no picketing at the company's premises. If there was no picketing, there would be no work stoppages.

9. Mr. Fraser was either unwilling or unable to fulfil these promises.

III

10. I will set out the events precipitating the current work stoppage in more detail below. First, it may be useful to briefly outline the scheme of the *Labour Relations Act*, and the way in which strikes are defined and regulated. That scheme was recently considered in *Empress Graphics*

Inc., [1989] OLRB Rep. June 587, where a group of employees asserted that they were entitled to engage in a concerted work refusal because their collective agreement contained a “hot cargo” clause. The Board reviewed the law as follows:

10. The definition of the term “strike” was in issue before the Board some years ago in *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569). In that case a number of employees left their jobs and refused to work because of their disapproval of the federal wage control legislation. There was no immediate dispute with their own employers, but the work stoppage had the effect of interfering with production at local work places. An employer, Domglas, sought a cease and desist direction in much the same way as the applicant does here. At page 573 the Board had this to say:

12. The definition of strike as found in the *Labour Relations Act* appears broad enough to encompass the kind of work stoppage that is the subject matter of this application. On its face, the statutory definition appears to require only that the work stoppage, or other disruption of work, result from the combined or concerted action of employees. The two essential conditions for conduct to be characterized as a strike, therefore, appear to be: 1) concerted employee activity; 2) some disruption of the employer's operation. The question is whether we should read into this definition a further condition that the conduct be carried out for the purpose of obtaining concessions from the employer, or some other employer.

11. The Board held that in order for an activity to fall within the definition of “strike”, there need be no intention to extract concessions from the immediate employer. The definition of strike was broad enough to encompass purely sympathetic action such as that which is involved in this case. (Indeed the definition of lockout expressly contemplates such “sympathetic” employer action). This broad definition of the term strike was approved in a unanimous decision of the Divisional Court reported as *Re United Glass & Ceramic Workers of North America et al.* (1978), 19 O.R. (2d) 353.

12. I should also note the subsequent decision of the Supreme Court of Canada in *Re Maritime Employers Association*, 78 CLLC ¶14,171. There, the Court affirmed that a concerted refusal to cross picket lines because of the commonly-held belief in union solidarity was nevertheless a strike. The notion of solidarity which provides the “glue” binding workers to their trade union and its purposes, could also provide the ingredient of “common understanding” necessary to meet the definition of the term “strike” in statutes such as the *Labour Relations Act*.

13. It is also important to emphasize the extent to which the Ontario statute prohibits *any* collective job action during the term of the collective agreement. Not only is the definition of the term “strike” a comprehensive one, but section 42 of the Act requires every collective agreement to contain a “no strike” clause. Parties are obliged to include in their contractual arrangements an absolute prohibition on collective action. If they do not, such clause is *deemed* to be included in the collective agreement.

14. The legislative formula and legal result can be stated quite simply. The collective agreement establishes a pact of industrial peace which endures until the agreement expires and the parties have completed the process of compulsory conciliation. During the term of the collective agreement there can be no *collective* job action, whether it be in support of demands by the employees themselves or in sympathy with fellow workers in other establishments. Such job action by employees is a breach of section 72 of the Act. If encouraged by trade union officials, it is a breach of section 74. If induced by “persons”, it may be a breach of section 76. In addition, any such job action is necessarily a breach of the “no strike” clause which must be included in all collective agreements in Ontario and which imports, as a matter of law, the statutory definition of strike.

15. Against this background, it is difficult to accept the union's submission that a collective employee work refusal, which otherwise looks very much like a strike, and which otherwise would fall within the statutory definition of a strike, is, nevertheless not a strike because of Article 34 of the agreement.

16. Counsel for the respondent union argues, quite ingeniously, that if the collective agreement defines circumstances in which employees are not required to work, it cannot be illegal for them to merely follow the terms of their collective agreement. Nor can the employer complain that they are doing so. Counsel notes that Article 34 of the current agreement has formed part of the parties' collective bargaining relationship for many years, and he asks, parenthetically: how can the employer now repudiate that provision and seek, from the Board, an order which virtually nullifies that aspect of the bargain? If the employer has undertaken not to require work in particular circumstances, how can it now seek a direction forcing employees to work in those very circumstances? Counsel urges the Board to find either that, as a matter of interpretation, this concerted refusal to work does not meet the definition of the term "strike" because no work was properly required in the first place, or, alternatively, that the Board should not relieve the employer of obligations or undertakings into which it freely entered.

17. This argument, rooted in appeals to freedom of contract, has its attractions but, in my view, is not consistent with either the structure of the *Labour Relations Act* or the Board's established jurisprudence.

18. When boiled down to its essence, the union's argument is that a bargaining party, bolstered by superior bargaining power, can, by verbal formula, determine what will or will not be a strike - notwithstanding section 42 of the Act and the panoply of provisions prohibiting collective action during the currency of a collective agreement. If the union's submission is accepted, it would be open to construct contractual language providing that no employees shall be required to work if the employer fails to capitulate to the union's position at the third stage of the grievance procedure, or if the employer refuses to acknowledge a union's jurisdictional claim, or if an employer discharges an employee for what the union believes is insufficient cause, or if the parent union, or a sister local, or the C.L.C. or the local Labour Council calls for sympathetic concerted job action. All that would be necessary is the verbal formula: "employees will not be required to work if ...", which in practical terms, may mean: "employees may strike when ...".

19. In the circumstances of this case I simply cannot accept the union's contentions; for, to do so, would virtually eliminate the legal, practical and policy thrust of the Act. It would accord to the parties the right, based upon their respective bargaining power, to define what is or is not a strike or lockout under the *Labour Relations Act* and would permit the very collective action for collective bargaining objectives which the statute purports to prohibit. That is not, in my view, an accurate reflection of the legislative intention, nor is it consistent with the Board's views expressed in cases involving similar issues.

20. In *King Paving*, [1976] OLRB Rep. June 291 and *Associated Freezers of Canada Limited*, [1972] OLRB Rep. May 445 there was a concerted refusal by employees to cross picket lines set up by another union, and in both cases, the employees pointed to provisions of their collective agreement which allowed them to refuse. The Board said - to put the matter colloquially - "you cannot contract out of the Act". The no-strike ban is imposed by statute as a matter of public policy, not the convenience or relative bargaining strength of the parties. It admits of no exceptions. Any private arrangement which purports to circumvent or avoid the thrust of the Act is void. A concerted refusal to cross a picket line was a strike even though the collective agreement purported to permit it. (See also *Hutchison Mechanical Installations Ltd.*, [1973] OLRB Rep. May 240, *Pitts Atlantic Construction v. Construction and General Labourers* [1982] 141 D.L.R. (3d) 164, and [1984] 17 D.L.R. (4th) 384 (Nfld. C.A.).)

21. In *Piggott Construction Company Ltd.*, [1969] OLRB Rep. June 399 the Board held that a trade union could not reserve a right to strike in favour of jurisdictional claims. In *Belmont Plastering Company Ltd.*, [1970] OLRB Rep. Mar. 1459 the Board held that a trade union could not reserve a right to terminate the collective agreement early and therefore put itself in a position to strike if an employer failed to remit union dues required by that collective agreement (see also section 52 of the Act). In *Dover Corporation (Canada) Ltd.*, [1972] OLRB Rep. May 435 the Board observed that the fact that there might have been alternative work available for the striking employees was irrelevant. They could not engage in a collective refusal of the tasks to which they had been assigned. Nor, in the exercise of the Board's discretion under section 92 of the Act, does it matter that there may be other remedies available to the aggrieved employer by way of damages or disciplining recalcitrant employees (see *Fabricated Steel Products Ltd.*, [1977] OLRB Rep. June 376).

22. In summary then, a perusal of the Board's jurisprudence in this area significantly diminishes the union's claim to some kind of "reliance interest" on its current contract language. The Board has, for years, routinely rejected efforts by parties to construct or rely upon collective agreement language that would permit mid-contract work stoppages.

(See also the decision of the Board in *T.T.C.*, [1984] OLRB Rep. Dec. 1781, where the Board again found that a refusal to cross a picket line in sympathy with striking workers, constituted an "unlawful strike".)

11. It will be seen from *T.T.C.*, *Empress Graphics Inc.*, and the cases cited therein, that the law in this area has been settled and consistently applied for almost twenty-five years: there can be no "strike" of any kind during the currency of a collective agreement or until the completion of the conciliation process, notwithstanding clauses in a collective agreement which might be said to authorize such collective refusal to work; a concerted refusal to cross a picket line can constitute an unlawful strike; and the element of "concertedness" or "common understanding" necessary to meet the strike definition can be established where it is shown that workers are responding to "the commonly understood principle of the labour movement that members of unions should not cross picket lines" - to borrow the words of the Supreme Court of Canada in *Maritime Employers' Association*, *supra*. There is no doubt, therefore, about the legal principles which must be applied to the facts of this case.

12. I should add, however, that quite apart from the established case law, Article 8.02 is quite different from the clause under consideration in *Empress Graphics*. Article 8.02 provides only that "it shall not be a violation of [the] agreement... if employees refuse to cross a picket line established in support of a lawful strike". Its effect is limited to rights and remedies *under the agreement*. The clause cannot, and does not, determine what might be a violation of the *Labour Relations Act*, or preclude any remedy which might be available under the statute. Accordingly, Article 8.02 is of no assistance to the respondents in this case.

13. With this brief outline of the law, I return to the facts in the instant case. I might note that in assessing the credibility of the various witnesses, I have taken into account such factors as: the demeanour of the witnesses when giving their evidence; the clarity, consistency, and general plausibility of that evidence when compared with that of other witnesses and subjected to the test of cross-examination; the tendency of the witnesses to colour or tailor their evidence in accordance with their self-interest; and what inferences seem most probable and reasonable in all the circumstances. On that basis, I accept the evidence of Larry Hargreaves without reservation, I generally accept the evidence of witnesses Lamondy, Fyfe and White, where it is in conflict with that of other employee witnesses, and I reject to a greater or lesser extent the testimony of employees Dault, Bowring, Scott and Scrivo.

IV

14. The applicant company is a division of Oshawa Holdings Limited, which in turn is a wholly-owned subsidiary of the Oshawa Group Limited. The company operates a food service business from a warehouse located at 500 Fenmar Drive, Weston, Ontario, and services a variety of customers including restaurants, hospitals and large catering facilities. Its business is "time sensitive"; that is, customers expect orders to be delivered as soon as possible. The company operates twenty-four hours a day from Monday to Friday and employs warehousemen and truck drivers to "pick" and deliver its customers' orders. These employees are represented by Teamsters Union Local 419. Local 419 is a so-called "composite local", with members who work for a number of different employers. Local 419 has separate collective agreements/bargaining relationships with those employers.

15. The company is a party to a collective agreement with Teamsters Local Union No. 419 which expired on March 9, 1991, and has been extended pursuant to section 79 of the *Labour Relations Act*. The company's employees are not now in a position to engage in a lawful strike, Local 419 is not entitled to authorize a strike, and union officials are not permitted to counsel, encourage, procure or support a strike.

16. One of the employers with which Local 419 has a bargaining relationship is the Ontario Produce Company, Oshawa Foods Division ("Oshawa Foods"). It must be noted, however, that Oshawa Foods is not merely a separate corporate entity. There is also a separate bargaining unit, and a separate collective agreement. The "Oshawa Foods" premises are some miles away from the applicant's warehouse on Fenmar Drive.

17. At approximately twelve noon on Tuesday, April 30, 1991 the employees of Oshawa Foods (members of Local 419) began a lawful strike. At about 2:30 p.m., pickets appeared at the Fenmar warehouse and began to patrol near two of the warehouse entrances. The applicant's evening shift was scheduled to begin at 3:00 p.m. The evening shift did not report for work.

18. The picketing continued, sporadically and with varying numbers of pickets, over the next few days. The picketing was ongoing as late as Saturday, May 4, the last day of the hearing in this matter. So long as the pickets were present, employees, including the respondents, refused to report for work as scheduled. When the pickets were not present, work proceeded as usual.

19. The applicant's employees are neither performing nor being asked to perform "struck work" - that is, work which would ordinarily be performed by the employees currently engaged in the lawful strike against Oshawa Foods. The applicant's employees *are* being asked to perform their regularly-scheduled duties, notwithstanding the strike and picketing in which their fellow members of Local 419 are currently engaged.

20. Much of the union's evidence consisted of the testimony of individual employees, who told the Board, under oath, why they "personally" had refused to cross the picket line and report for work. I do not think that it is necessary to record the details of that testimony here - not least because much of it was contradictory and portions were simply not credible. It suffices to say that (with a couple of exceptions) I am not satisfied that the employees' refusal to work was motivated by any genuine fear of physical injury or property damage, notwithstanding some of the witnesses' testimony to that effect.

21. Except in the case of Mr. Hebert and some profane invective on Tuesday evening, there were no threats, no incidents of violence, and no actual, or real threat of, property damage. On the contrary. The evidence establishes that the relationship between the applicant's employees and the picketers was quite amicable - a situation which is hardly surprising in the circumstances. Not only are the respondent employees members of the same local union and generally sympathetic to the objectives of their fellow workers, but also in the past, the applicant's employees have themselves picketed the premises of Oshawa Foods, and in that instance, both sought and received the support of the Oshawa Foods workers. Accordingly, it is hardly surprising that the applicant's employees might now be disposed to "return the favour" when their own workplace was picketed by fellow members of Local 419 seeking their support. And, in addition to this natural inclination to support members of the same local union, there is the well-established belief that trade unionists - especially Teamsters - should honour the picket lines of fellow workers.

22. Paul White testified that when he heard about the *possibility* of a strike at Oshawa Foods, he phoned the applicant company to find out if there was any picketing at the Fenmar location, and advised that if there was a picket line he would not be reporting for work. Similarly,

Armand Lamonday told the company that if there was a picket line at the applicant's Fenmar warehouse, he did not intend to cross. White and Lamonday are both union officials. Neither employee mentioned any concern about safety, nor at the time that these remarks were made were they even confronted with a picket line. In cross-examination Mr. Lamonday said, in part:

"I'm a Teamster, I have been one for eighteen years, and I have never crossed a picket line... Teamsters don't do it... I don't care if there are one thousand guys [on the line] or only one little old lady in a wheelchair... I am not going to cross a picket line".

Mr. White said that he felt that the pickets had the same "belief in trade unionism" that he had, that he was not going to cross a picket line, and he did not expect any other employee to do so.

23. George Fyfe testified that upon encountering the picket line at about 2:50 p.m. on Tuesday, April 30 he rolled down the window of his car and after a brief conversation with a picketer advised that he did not intend to cross. Mr. Fyfe testified that he had earlier heard about the situation at Oshawa Foods on the radio and had decided that, if there was a picket line at the Fenmar location he would not cross. Like the company, Fyfe predicted that if Oshawa Foods went on strike, picketers would likely appear at the Hickeson-Langs warehouse in Weston - just as he and his fellow workers had picketed the Oshawa Foods premises when they were on strike. Mr. Fyfe conceded in cross-examination that there was no actual threat, intimidation or coercion, nor any fear on his part. He said that respecting a picket line is a "convention when one works in a union shop"; its a part of the "code of being a trade unionist", and a demonstration of "working class solidarity".

24. Even those employees who initially raised the prospect of violence or property damage admitted in cross-examination that as a matter of trade union ethic and union solidarity they would not cross a picket line. Clay Bowring testified that he had never crossed a picket line and he never intended to do so. He said he wanted to help his fellow workers and the refusal to cross was not a "tough decision". He testified that "if there is a line up I'd never go through it... I wouldn't cross even if it was illegal... there were no threats... I was just asked to honour the line and I said yes... some days [union solidarity] sucks but it's necessary... it's important to recognize picket lines...".

25. Ron Scott testified that he "won't go over anyone's picket line". On the Thursday evening, May 2, he called the company and upon learning that the pickets were still there he decided not to report for work. I am satisfied that safety had nothing to do with it.

26. I do not think that it is necessary to multiply the examples. With two exceptions set out below, I find that the employee respondents' work refusals were not motivated by any concern for their safety, but rather were an expression of support for, and solidarity with, their fellow Teamsters. I further find that, as union stewards, employees White, Lamonday, and Scrivo not only indicated to the company that they would respect the picket line and refuse to work but, by their example, encouraged and supported the refusal of other workers. Scrivo's advice to others that it was "their choice" was a complete sham when at the same time, he was making it clear that he did not intend to cross himself or expect anyone else to do so.

27. The participation of stewards White, Lamonday and Scrivo created an aura of authorization and encouragement which was not repudiated by any other official of Local 419, notwithstanding the company's advance notice of potential problems, its repeated request of the union's secretary-treasurer to ensure compliance with the employees' work obligations and the union's undertaking in November 1988. Those company requests continued throughout the course of these proceedings of which the union president and secretary-treasurer had notice and for which the secretary treasurer at least was occasionally present. Yet, at no time was there any effort by these

individuals to take corrective action to ensure that the employees complied with the law. In short, there was both active participation in the work stoppage by local union officials, and a singular (and unexplained) lack of action by its most senior officials. In the circumstances, it is reasonable to infer that the work stoppage was “authorized” by the union.

28. The situation of Mr. Lamonday is a little different. I am satisfied that he threatened an unlawful strike when he indicated that he would respect the picket line should one appear. However, as it turned out, he did not actually *engage* in an unlawful strike. He took his empty truck across the picket line the first time he encountered it, and on his second encounter was advised by the pickets that there was no need to cross because managers were driving the trucks across the line. On that occasion, Mr. Lamonday parked his truck and gave his keys to a supervisor who, without comment, drove the truck into the warehouse. While I have no doubt that Mr. Lamonday would have refused to cross the line had he been directed to do so, the fact is that he was not so directed and, accordingly, in his case, I cannot conclude that there was a refusal to work. On the other hand, his general refusal to cross the picket line and comments to that effect were a signal to others that they should do likewise.

29. Early in the morning of May 1, Wayne Hebert and his wife approached the picket line and were accosted by a group of somewhat drunken pickets who blocked his car, seized the steering wheel, demanded to know “where the fuck he was going” and told him “you’re not going anywhere”. Mr. Hebert decided that it was wise to withdraw at this point. This particular work refusal cannot be construed as participation in an unlawful strike.

30. The Board notes that the applicant company has withdrawn its complaint insofar as it relates to employees Hebert and Holland. Similarly, the company is content that the Board draw no adverse inference from the failure to testify of employees Durham, Pittman, Towers, or Glover.

31. On the basis of the evidence before me, I am satisfied that the respondent employees (save as expressly excepted above) have engaged in an unlawful strike, that such strike was authorized by Local 419, and that the strike was encouraged and supported by at least two union officials: White and Scrivo.

V

32. Should I exercise my discretion to make a declaration and remedial directions? In my view, I should.

33. The labour dispute with Oshawa Foods is still ongoing, and so is the picketing which precipitated the unlawful work stoppage. That unlawful work stoppage is also ongoing as at the completion of the hearings. There is no basis for supposing that the picketing will stop, even though it might be regarded as “secondary” and therefore unlawful. As things now stand, there is no Court Order to limit or eliminate the picketing at the Fenmar Drive warehouse; and so long as the picketers are there, the respondents are likely to honour the picket line, as they have over the last few days.

34. Both before and throughout the course of this proceeding, the union has been urged to repudiate the employees’ actions and take steps to ensure adherence with the collective agreement. There is no evidence that it has taken any such steps, notwithstanding the company’s urging and its own undertaking in the previous proceeding before the Board. There is, therefore, a reasonable basis for the employer’s concern that, without a Board declaration and direction, the illegal job action will continue or will be repeated whenever pickets appear at the Fenmar location. Finally, there may still be some residual belief, among some employees, that Article 8.02 permits them to

refuse to cross picket lines established at their own place of work. That is not the case, and the issuance of a declaration and direction may therefore have some educational effect foreclosing future illegal employee action, or, at the very least, putting employees clearly on notice that a continuation or repetition of such conduct may result in further legal proceedings with consequent civil or criminal sanctions.

VI

Direction and Order

35. Having regard to the foregoing, the Board hereby makes the following orders and remedial directions:

DECLARATIONS

- (1) the Board *declares* that employees of the applicant company (including employees Scrivo, Sloan, Scott, Tarasco, Fyfe, Quin, White, Dault, and Bowring) engaged in an unlawful strike contrary to section 72(2) of the Act;
- (2) the Board *declares* that the individual respondents, Scrivo and White, being union officials, supported or encouraged that unlawful strike contrary to section 74 of the Act;
- (3) the Board *declares* that all of the named respondents (with the exception of employees Holland, Hebert and Lamonday) have done acts which they know or ought to have known would, as a probable and a reasonable consequence, prompt other persons to be engaged in an unlawful strike contrary to section 76(1) of the Act;
- (4) the Board *declares* that the respondent union has authorized an unlawful strike contrary to section 74 of the Act.

DIRECTIONS

- (1) the Board directs that the *respondent union*, its officers, servants, agents and representatives, and any person acting on its behalf, cease and desist from calling, authorizing, or threatening to call or authorize an unlawful strike;
- (2) the Board directs that employees Scrivo, Sloan, Scott, Tarasco, Fyfe, Quin, White, Lamonday, Dault, and Bowring, and any other employee who may have notice of this order, cease and desist from engaging in an unlawful strike; and in particular, cease and desist from their current concerted refusal to cross the picket line established at the company's premises at 500 Fenmar Drive, Weston, Ontario;
- (3) the Board directs that union officials Scrivo and White and any other union official who may have notice of this order, forthwith cease and desist from supporting or encouraging an unlawful strike, or doing acts which they know or ought to know will prompt others to engage in an unlawful strike;

- (4) the Board directs that all of the respondents (excluding employees Holland and Hebert) refrain from any act which they know or ought to know will prompt other persons from engaging in an unlawful strike;
- (5) the Board directs that the respondent union and its officials forthwith provide a copy of this direction to all of the applicant's employees;
- (6) the Board directs that the respondent union advise the members of Local 419 who are the employees of Oshawa Foods of this direction, and to draw to their attention section 70 of the *Labour Relations Act* which reads as follows:

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

- (7) the Board directs that the respondent union provide a copy of the reasons for this decision to all employees of the applicant whom it represents, forthwith after the release of those reasons;
- (8) the Board directs that the respondent Teamsters' Union 419 post copies of the Board's reasons for decision in prominent places where they will come to the attention of all members of the local union; and without restricting the generality of the foregoing, in the union's offices, and on any employee bulletin board to which Local Union 419 has access at the premises of any employer with whom Local Union 419 has bargaining rights.

0350-91-U Hickeson-Langs Supply Company, Applicant v. Teamsters Local No. 419 and Sam Scrivo, Gary Sloan, Ron Scott, Nick Tarasco, George Fyfe, Ian Quin, Dan Holland, Paul White, Armand Lamonday, Wayne Hebert, Gerry Dault and Clay Bowring, Respondents

Reconsideration - Remedies - Strike - Union asserting that evidence did not support Board's rulings and that certain remedial directions unwarranted or beyond Board's jurisdiction - Board acknowledging that trade union cannot breach s.76 of the Act and varying direction accordingly - Board finding no reason to reconsider, vary or revoke any other finding, direction or declaration

BEFORE: R. O. MacDowell, Alternate Chair.

DECISION OF THE BOARD; May 27, 1991

I

1. This is an application for reconsideration of a decision of the Board dated May 10, 1991 in which the Board found, *inter alia*, that: employees of the applicant company have engaged in an unlawful "sympathy" strike; union officials supported or encouraged that unlawful strike; and the union authorized the unlawful strike. The work stoppage occurred when employees who are members of Teamsters Local 419 refused to cross a picket line established at their place of work by *other members* of Local 419 who work for *another* employer at *another* location. The Board made a series of declarations and directions designed to bring the strike activity to an end and discourage its repetition. The respondents urge the Board to reconsider and revoke certain of those declarations and directions.

2. Section 106(1) of the Act reads as follows:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

In my view, section 106(1) gives the Board a plenary power of reconsideration even though the Board's orders have been filed in Court pursuant to section 94. I should note at the outset however, that the respondents do not quarrel with the statement of law in *Empress Graphics Inc.*, [1989] OLRB Rep. June 587 (application for judicial review dismissed in an unreported decision of the Divisional Court dated March 21, 1990), which the Board applied in the instant case. The respondents assert that the evidence did not support the Board's rulings, and that certain remedial directions were either unwarranted or beyond the Board's jurisdiction.

3. It will be convenient to deal with these submissions one by one. For ease of exposition, I will not repeat the evidence except as necessary to respond to particular items in the request for reconsideration.

II

Direction (6)

4. Board remedial Direction (6) reads as follows:

- (6) the Board directs that the respondent union advise the members of Local 419 who are the employees of Oshawa Foods of this direction, and to draw to their attention section 70 of the *Labour Relations Act* which reads as follows:

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

The respondents assert that Direction (6) should be revoked because:

"The lawful picket line that was at Hickeson-Langs has come down. The applicant did not seek a declaration that would encompass such a direction. [and] No useful labour relations purpose would be served by this direction".

5. Paragraphs 33 and 34 of the Board's decision read as follows:

33. The labour dispute with Oshawa Foods is still ongoing, and so is the picketing which precipitated the unlawful work stoppage. That unlawful work stoppage is also ongoing as at the completion of the hearings. There is no basis for supposing that the picketing will stop, even though it might be regarded as “secondary” and therefore unlawful. As things now stand, there is no Court Order to limit or eliminate the picketing at the Fenmar Drive warehouse; and so long as the picketers are there, the respondents are likely to honour the picket line, as they have over the last few days.

34. Both before and throughout the course of this proceeding, the union has been urged to repudiate the employees’ actions and take steps to ensure adherence with the collective agreement. There is no evidence that it has taken any such steps, notwithstanding the company’s urging and its own undertaking in the previous proceeding before the Board. There is, therefore, a reasonable basis for the employer’s concern that, without a Board declaration and direction, the illegal job action will continue or will be repeated whenever pickets appear at the Fenmar location. Finally, there may still be some residual belief, among some employees, that Article 8.02 permits them to refuse to cross picket lines established at their own place of work. That is not the case, and the issuance of a declaration and direction may therefore have some educational effect foreclosing future illegal employee action, or, at the very least, putting employees clearly on notice that a continuation or repetition of such conduct may result in further legal proceedings with consequent civil or criminal sanctions.

6. Counsel’s submission that the picketing has now stopped is not a “fact” established in evidence, nor a representation which I am prepared to give any significance. The fact is that in November 1988 the union undertook to “take reasonable steps to prevent unlawful strikes at the employer’s Toronto Branch premises and to take reasonable steps to end unlawful strikes should strikes occur”, and in late April 1991 the Secretary-Treasurer of Local 419 gave the company specific assurances that no picketing would occur. The union and the employer both knew that if there was picketing by Local 419 members employed by Oshawa Foods, the Local 419 members employed by the applicant might respect those picket lines and engage in a sympathy strike. Yet despite that 1988 undertaking, those more recent assurances, and the commencement of these proceedings, picketing did occur at the company’s premises and did cause an unlawful sympathy strike. There is clearly no agreement or guarantee that it will not reoccur. Nor is it entirely accurate to describe this picketing as “lawful”. That matter was not put in issue before the Board so that at this stage, one can only say, that there is no Court decision declaring the picketing to be unlawful “secondary” action, nor any declaration from this Board that the picketing is contrary to section 76(1) of the Act.

7. The picketers are not strangers to the respondent union or the respondent employees, and the applicant company is not an accidental or incidental target of their picketing. The picketers are themselves members of the respondent Local 419 whose support the respondent employees have sought in the past by picketing the Oshawa Foods premises. And there is a corporate connection between Oshawa Foods and the applicant. These historical and institutional connections are an important subtext to the illegal strike that occurred, and warrant a direction that Local 419 advise *both* groups of its members of their rights and obligations under the Act.

8. Finally, it was part of the union’s argument that workers were refusing to cross the picket line because of threats, intimidation, coercion, or a reasonable fear thereof. There was some basis for concern in isolated instances which might multiply if the respondent employees obey the law. That is why the company requested a direction that Local 419 (by notice or otherwise) advise all of its members of their obligations under the *Labour Relations Act*, and a reference to section 70 is included in Direction (6).

9. In the circumstances, the Board sees no reason to reconsider, vary or revoke Direction (6).

Direction (8)

10. Board Direction (8) reads as follows:

- (8) the Board directs that the respondent Teamsters' Union 419 post copies of the Board's reasons for decision in prominent places where they will come to the attention of all members of the local union; and without restricting the generality of the foregoing, in the union's offices, and on any employee bulletin board to which Local Union 419 has access at the premises of any employer with whom Local Union 419 has bargaining rights.

The respondent union complains that this direction extends notice of this proceeding to members of Local 419 who are not directly engaged in the work stoppage either as picketers or sympathetic strikers, and that therefore the direction is beyond the Board's jurisdiction.

11. I do not agree. As in the case of Direction (6), the underlying reasons for the Board's remedial direction are discussed in paragraphs 33 and 34 of the decision. Direction (8) is related to the pattern of unlawful activity established in evidence, the way in which that activity has arisen and the way in which it is likely to arise in the future if *all* members of Local 419 are not put clearly on notice of their rights and obligations under the *Labour Relations Act*.

12. There is an established and ongoing pattern of unlawful work stoppages involving Local 419, and an evident inclination by Local 419 members (or some of them) to picket the premises of employers other than their own, thereby precipitating unlawful sympathetic action. In that context, and in light of Local 419's previous assurances and undertakings, the Board determined that a more specific and concrete step was required: a specific direction to post the Board's reasons (including its statement of the law) in prominent places where it would come to the attention of *all* members of Local 419. No *remedy* was sought *against* those other members of Local 419 who are not respondents herein; however, in my view, this posting obligation on the part of the union *respondent* is entirely appropriate where it has authorized an unlawful strike, its officials have encouraged, promoted or participated in an unlawful strike, some of its members have engaged in an unlawful strike, and other members in another bargaining unit have engaged in picketing activity which prompted that unlawful strike. It remains to be seen whether this direction will have the desired prophylactic effect. At the very least, the employees will be put on notice of the legal framework in which their rights will be determined.

Direction (4)

13. Direction (4) reads as follows:

- (4) the Board directs that all of the respondents (excluding employees Holland and Hebert) refrain from any act which they know or ought to know will prompt other persons from engaging in an unlawful strike;

Local 419 submits that the evidence does not establish that it "authorized" the collective work refusal of the respondent employees.

14. The evidence established:

- there was an unlawful work stoppage in 1985 involving some of the Local 419 officials (stewards) named herein;
- there was a work stoppage in 1988 in which the union undertook

inter alia to “take reasonable steps to end unlawful strikes should such strikes occur”;

- the company made it clear to its local officials (stewards) that they were obliged to work as scheduled and take steps to ensure that other members did the same;
- the company sought and received from the Secretary-Treasurer of Local 419 specific assurances that there would be no problems in 1991 in the event of a lawful strike involving Local 419 members working at Oshawa Foods;
- despite those assurances and undertaking, there was a sympathy strike at the company’s premises;
- local union officials (stewards) threatened the strike;
- local union officials (stewards) encouraged and supported the strike;
- local union officials (stewards) *participated* in the strike;
- Local 419 had notice of the picketing, notice of the sympathy strike, and notice of these proceedings which were before the Board for several days and during which the company again urged the Local to take steps to end the strike;
- there is no evidence that any union official took any steps of any kind to disavow, repudiate or rectify the actions of the Local 419 stewards, or to advise those stewards or anyone else that a work stoppage at this time was unlawful.

15. A trade union is an artificial legal entity which can only act through its officials (or perhaps by the unanimous resolution of its membership), and the mere occurrence of an unlawful work stoppage does not establish or imply union authorization or approval. Indeed, even the presence of a union officer in the midst of the strikers, may not, in itself, establish union complicity. Thus in *Steinberg Inc. (Miracle Food Mart Division) & Teamsters Local 419*, [1982] OLRB Rep. Sept. 1366, the Board was not persuaded that the then president of Local 419 had supported or encouraged an unlawful strike even though he was clearly on the scene and involved in a dialogue with the unlawful strikers. The Board concluded that he was there in an effort to resolve the strike, not encourage or prolong it.

16. On the other hand, the arbitral jurisprudence establishes that a union is ordinarily responsible where stewards instigate, encourage or actively participate in unlawful activity, and a union has an affirmative obligation to attempt to end the strike. In *Re Polymer Corporation Ltd.*, (1958) 59 CLLC ¶18,158 Professor Laskin, as he then was, concluded that:

“The essential thing was to show official disassociation from the unlawful strike by separating union functionaries from demonstrators”.

In *International Longshoreman’s Association Local 273 et al v. Maritime Employers’ Association et al*, 78 CLLC ¶14,171 the Supreme Court of Canada put it this way:

“The language of the contract placed an affirmative duty on the union acting through its leaders

at all levels of the organization so as to reveal an intent through appropriate overt acts to abide by and to promote the terms of the Collective Agreement. The evidence on the record in these proceedings is quite the opposite. Not only is there no evidence of any action on the part of the union through its agents, that is its officers, to perform the undertaking given in the articles set forth above [the no strike clause], but, on the contrary, the leaders of the Locals themselves failed to respond to the request by the Association [the employer] to report for work”.

Where, as here, *union officials* have actively supported, encouraged and participated in the unlawful strike activity and all the other evidence (including total inaction) suggest union acquiescence and approval, there is a reasonable inference that the strike was “authorized” by the union.

17. There is no reason to reconsider paragraph 27 of the Board’s decision, or Declaration (4).

Declaration (3)

18. Board Declaration (3) reads as follows:

- (3) the Board *declares* that all of the named respondents (with the exception of employees Holland, Hebert and Lamonday) have done acts which they know or ought to have known would, as a probable and a reasonable consequence, prompt other persons to be engaged in an unlawful strike contrary to section 76(1) of the Act;

The union raises a legal challenge to this declaration insofar as it purports to apply to Local 419. The union submits that Local 419 is not a “person” within the meaning of section 76(1); and, accordingly, there can be no breach of this section even if it did acts which it knew would create a strike (i.e. by “authorizing” that strike, or by its officials’ counselling, procuring, supporting, encouraging or engaging in the strike). The union relies on the decision of the Board in *Consolidated Bathurst Packaging Ltd.*, [1982] OLRB Rep. Sept. 1274, where it is said:

“Section 76 cannot be breached by a trade union in that it directs that “no person shall” and, in the context of this legislation, the term “person” is not a reference to a trade union”.

19. At the hearing, the union did not dwell on the precise elements of section 74 or section 76, nor did the union draw the Board’s attention to *Consolidated Bathurst*. The focus of the union’s argument was its contention that there was no strike at all because the work stoppage was the product of individual employee decision-making (see paragraph 2 of the Board decision). However, *Consolidated Bathurst* is a clear and relatively recent statement of the law, a trade union is not a “person” at common law, and when sections 76(1) and 74 are read together, the actions of “persons” are distinguished from those of “unions” and union officials (although, of course, union officials are “persons” too). I am persuaded, therefore, that Declaration (3) is overly broad in its reference to “all of the named respondents”. Declaration (3) is therefore revoked, and the following substituted therefor:

- (3) the Board *declares* that all of the named respondents (with the exception of employees Holland, Hebert, and Lamonday, and the respondent union) have done acts which they know or ought to have known would, as a probable and reasonable consequence, prompt other persons to engage in an unlawful strike contrary to section 76(1) of the Act.

For the purpose of clarity, I should note that this declaration therefore *includes* both union officials who encouraged, supported or participated in the unlawful strike and any employees who did the same. Their refusal to work may have been the product of a common understanding, group consciousness, and “union solidarity”, however, it had the effect of encouraging everyone to adhere to this common rule, and engage in an illegal sympathy strike.

3225-89-G Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America, Applicant v. King Edward Cabinets, Respondent

Construction Industry - Construction Industry Grievance - Practice and Procedure - Witness - Witness attending hearing under subpoena - Hearing adjourned *sine die* and Board directing witness to appear at any subsequent hearing date in accordance with subpoena - Matter brought back on for hearing and witness sent notice of hearing - Witness failing to appear - Union requesting that Board issue arrest warrant - Power to issue warrant to be used with caution and fairness - Board doubting technical foundation for warrant and declining to issue one

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

APPEARANCES: *Mike McCreary* and *Mike Yorke* for the applicant; no one appearing on behalf of the respondent.

DECISION OF THE BOARD; May 9, 1991

1. This is a grievance referral under section 124 which first came before the panel on August 29, 1990. At that time the applicant presented the Board with evidence that King Dean Yee had been properly served with a subpoena *duces tecum*, together with the appropriate conduct money summoning him to appear on August 29, 1990. Mr. Yee did appear and the panel heard his submissions and those of the applicant. We then ruled orally that we would grant an adjournment *sine die* in the circumstances described in our written decision of August 31, 1990. However, as set out in that decision, the Board directed Mr. Yee to appear at any subsequent hearing dates in this matter in accordance with the subpoena unless the applicant notified him to the contrary.

2. This matter was brought back on for hearing by the applicant and Mr. Yee was sent a notice of hearing for April 18, 1991. Prior to that date his counsel wrote to the Board acknowledging, among other things, that his client had received the notice of hearing. On April 18th, the Board waited until 10:00 a.m. but Mr. Yee did not appear. The applicant requested that the Board issue a warrant for Mr. Yee's arrest.

3. We have no doubt that Mr. Yee knew he was required to appear on April 18th, 1991. The subpoena served on him summoned him to attend at the hearing on August 29th, 1990 "and so on from day to day until the hearing is concluded". Mr. Yee knew the hearing was not concluded on August 29th, 1990 and indeed the Board specifically ordered him on August 29th to appear at any subsequent hearing dates. This oral direction was then incorporated into the Board's written decision of August 31st, which was sent to Mr. Yee. The Board notified Mr. Yee of the subsequent hearing date of April 18th, 1991 by a notice of hearing dated March 8, 1991. We also heard sworn evidence from Michael McCreary that the applicant had not advised Mr. Yee that it was not necessary for him to appear.

4. The Board's authority to issue a warrant in these circumstances is set out in section 124(3) which applies section 44(8) to proceedings under section 124. Section 44(8)(a) provides as follows:

44.-(8) An arbitrator or the chairman of an arbitration board, as the case may be, has power,

- (a) to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases; and

• • •

5. The Board's powers in this regard were reviewed in *Re International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and Master Insulators Association of Ontario, et al*, (1979) 25 O.R. (2d) 9, and *Casalbil Contractor Limited*, [1980] OLRB Rep. Sept. 1278. In the latter case, the Board said as follows:

4. The Board is given the authority under the Act to enforce the attendance of a witness in the same manner as a court of record in civil cases. In Ontario, a court of record in civil cases has the authority to issue a warrant for the arrest of a person who has been duly served with a summons but has failed to appear. (See 26 C.E.D. (Ont. 3rd) 114-366, paragraph 673; Rule 275, Supreme Court of Ontario Rules of Practice.) The issuing of a warrant directed to the Sheriff to bring a person before the Board is to be distinguished from punishing a person for contempt committed in the face of the Board. The Board, in issuing such a warrant, is not punishing the witness for failing to attend. Indeed, it is our view that we cannot impose punishment for such action. (See *Re: Hawkins and Halifax County Residential Tenancies Board*, (1974), 47 D.L.R. (3d) 117 (N.S.S.C.).) Rather, it is ensuring that the witness attend before the Board to give evidence pursuant to a summons duly issued and served. However, should a witness refuse to testify after having been brought before the Board and after being directed by the Board to testify, such refusal may well constitute grounds for punishment by way of fine or imprisonment for contempt committed in the face of the Board. (See *Re: Diamond and Ontario Municipal Board*, [1962] O.R. 328; 32 D.L.R. (2d) 103.)

5. The Board may, therefore, enforce the attendance of a witness duly served with a summons and conduct money by issuing a warrant directing the Sheriff to arrest the witness and bring him before the Board if the party seeking such an order can establish that the witness was properly served with a summons and sufficient conduct money and that the presence of the witness is material to the ends of justice.

6. At the hearing on April 18th, we were satisfied that Mr. Yee was properly summoned to appear on dates that included subsequent hearing dates, that he was directed orally to appear on subsequent hearing dates, that he was notified of the subsequent hearing date of April 18th, that he failed to appear on that date and that his presence is material to the ends of justice. As a result, we indicated to the applicant that we were prepared to issue a warrant for the arrest of Mr. Yee.

7. Since that time, however, we have reconsidered the matter on our own motion. We note that in *Sentry Department Stores Limited*, [1964] OLRB Rep. Feb. 642 and *National Dry Company Limited*, [1982] OLRB Rep. May 713, the Board drew a distinction between the continuing effect of a summons where a hearing was adjourned to another stated date, and where a hearing was adjourned *sine die*. In the latter case, the Board said as follows:

The effect of a Board summons can, as the respondent points out, be continued from day-to-day as the hearing progresses, without the need for reissuing or re-serving a Summons, subject to the following provisos:

- (a) the required amount of conduct money for attendance and travel must be paid for *each* day of attendance, and
- (b) the witness must receive *official* notification of the time and place of continuation.

Requirement (b) may be met on the face of the summons itself, or may be met by the Board prior to adjourning the hearing advising the witness of the next scheduled date. When a hearing is adjourned *sine die*, however, the Board is obviously not in a position to accommodate the summoning party by following the latter procedure.

8. In the instant case, our initial view was that the combination of the original summons, the Board's direction to Mr. Yee to re-attend on any subsequent hearing dates and the Board's

notice of hearing for a subsequent hearing date satisfied the requirement that Mr. Yee receive official notice of the time and place of continuation. Subsequently, we have had some doubts in this regard. It is true that the Board did direct Mr. Yee to re-attend on any subsequent hearing dates, and in that sense, this case can be distinguished from those where the Board has adjourned a matter *sine die* without such a direction. In addition, while a notice of hearing might not alone serve as the kind of official notice which would found a warrant (see *Standard Insulation Limited*, [1984] OLRB Rep. Feb. 383), in this case it was linked to the Board's direction to re-attend. On the other hand, we did not specify a particular date at the time of our direction because the matter was adjourned *sine die*. As a result, this fact situation falls into a grey area in jurisprudential terms.

9. The Board has said previously that the power to issue a bench warrant ought to be used with caution and fairness since it is a serious step affecting personal liberty. (*Standard Insulation Limited*, *supra*). In these circumstances where we have some doubt as to the technical foundation for a warrant, we have decided not to issue one, despite our view that Mr. Yee was aware of his obligation to attend. Of course, there is nothing to prevent the applicant from serving Mr. Yee with a fresh subpoena and conduct money in the interval between now and the next hearing date on June 10, 1991, and we are certainly prepared to entertain a request for a warrant on that date, should it be necessary to do so.

10. We direct that a copy of this decision be sent to both Mr. Yee and his counsel.

1831-90-R United Steelworkers of America, Applicant v. Minnova Inc., Respondent v. Group of Objecting Employees, Objectors

Certification - Petition - Objecting employees filing petitions and union filing counter-petitions - Relevant, overlapping signatures on counter petitions all later than those on petitions - Union not contesting voluntariness of petition - Board finding counter-petition voluntary and reliable indication of employee wishes at time they signed it - Board reaffirming jurisprudence that it is the last statement of intention that will stand for purposes of Board's determination of level of membership support on certification application - Certificate issuing

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members G. O. Shamanski and H. Peacock.

APPEARANCES: Paula Turtle, J. Doucette and W. Dowsett for the applicant union; Lorne Firman, J. A. Snow and J. R. Wilcox for the respondent; Peter Hollinger and David LeBlanc for the objecting employees.

DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER H. PEACOCK: May 2, 1991

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board further finds, having regard to the agreement of the parties, that

all employees of the respondent at its Winston Lake Division in the District

of Thunder Bay, save and except forepersons, those above the rank of forepersons, office, technical, clerical and sales staff, students employed during the school vacation period and students employed in a cooperative training program.

Clarity Note: For the purpose of clarity the position of Mine Coordinator, Maintenance Coordinator in the mine, Operating Supervisor, Maintenance/Coordinator and Chief Electrician in the Mill are deemed to be forepersons and therefore excluded from the bargaining unit.

Also for the purposes of clarity, the position of metallurgist is excluded from the above bargaining unit as a technical employee.

constitute a unit of employees appropriate for collective bargaining.

3. The union in this matter had originally submitted membership evidence sufficient to establish that it had the support of fifty-five percent of the employees in the bargaining unit agreed to. There were ninety-nine employees in the bargaining unit at the time the application was made. The applicant filed membership evidence in respect of sixty-one of those employees. (It actually filed sixty-six membership cards but five of those cards did not match the names on the employer's list at the relevant date as agreed among the parties.) The objecting employees filed with the Board fifty individual petitions; seventeen of those who signed petitions in opposition to the union had earlier signed a membership card in the applicant. The applicant also filed with the Board forty-one counter-petitions signed by individuals, thirteen of whom had also signed petitions in opposition to the certification of the applicant, as well as membership cards.

4. The reaffirmations or counter-petitions filed by the union thus bore signatures of a sufficient number of employees which overlapped with both the petition and the original membership evidence that, if found to be voluntary, they could re-establish the support of fifty-five percent of the members of the bargaining unit. The Board therefore commenced with an inquiry into the voluntariness of the re-affirmations or counter-petitions.

The Facts

5. The respondent operates a mine near Schreiber, Ontario, north-east of Thunder Bay. The campaign leading up to this application for certification, filed on October 12, 1990, commenced some six months earlier in the spring of 1990. It was the third application for certification relating to the respondent's miners in eighteen months, the two previous applications having been dismissed after representation votes. The most recent applicant was the Mine Mill and Smelter Workers Union. An earlier application was launched by the present applicant. The current campaign started immediately after the results of the vote against Mine Mill and Smelter Workers Union were known.

6. As a matter of policy, and on the direction of the union's legal department, the organizers assigned to this campaign, Wes Dowsett and Gerry Doucette, circulated and arranged to have circulated cards reaffirming support in the steelworkers campaign, which read as follows:

COUNTER PETITION [ORGANIZING CAMPAIGN]

To: THE ONTARIO LABOUR RELATIONS BOARD
400 University Avenue,
Toronto, Ontario M7A 1V4

Re: File # _____
 UNITED STEELWORKERS' OF AMERICA [applicant]
 - and -
 _____ [respondent]

I, the undersigned employee of hereby revoke my support for any petition against the United Steelworkers of America and hereby reaffirm my allegiance to the United Steelworkers of America and voluntarily express my desire that the United Steelworkers of America be certified as my Bargaining Agent.

Date	Time	Place

Name	Signature	Witness

7. The plan was to leave these documents to the very end of the campaign in order to put the union in a position to counteract the effect of any petitions filed in opposition to the application for certification. In this campaign the organizers were aware that a petition in opposition to the application had been circulated and they hoped to regain any support lost to that petition and put the application back in a position for automatic certification.

8. The petition documents submitted in opposition to the union were in the following form:

TO WHOM IT MAY CONCERN:

I AM AN EMPLOYEE OF MINNOVA INC. (WINSTON LAKE). I HEREBY WISH TO OPPOSE THE APPLICATION FOR CERTIFICATION BY THE UNITED STEELWORKERS OF AMERICA UNION AS I WISH MINNOVA INC. (WINSTON LAKE) TO REMAIN A NON-UNION WORKPLACE. I HEREBY SIGN THIS PETITION VOLUNTARILY.

THIS WILL ALSO SERVE TO NULLIFY ANY UNION CARDS OR MEMBERSHIP FORMS WHICH I MAY HAVE PREVIOUSLY SIGNED INDICATING MY DESIRE TO BECOME ASSOCIATED WITH ANY LABOUR MOVEMENT.

DATED AT Schreiber, ONTARIO, THIS 23 DAY OF Oct, 1990.

 Witness

 Signature (Please print name below)

9. The four people involved in receiving reaffirmation signatures gave evidence. These were two professional organizers already named and Tom Jameus and Mark Cadarette, two employees of Minnova Inc. All of the reaffirmation signatures were gained between October 22 and October 25, 1990, the large majority of them on October 24 and 25. All of them were gained on dates later than those written on the petition document. Only people who had previously signed membership cards in the union were approached to sign the counter-petitions and an attempt was made to gain as many as possible, whether or not they had signed the petition. The custody of all

the signed counter-petition forms was accounted for from the time the blanks were generated on a computer by Mr. Dowsett until they were mailed to the Board by Messrs. Dowsett and Doucette on October 25. Re-signing membership cards was not part of the counter-petition campaign.

10. Each person was given an opportunity to read the form of the counter-petition. Each of the four witnesses said slightly different things to the people with whom they discussed the signing of the counter-petitions. Mr. Dowsett started spreading word with the inside committee on October 23 that members could expect to see the organizers during the last few days of the campaign with a counter-petition. He told the people before they signed that it was not his concern whether or not the individual had signed the petition but that he was circulating a counter-petition among all of those who had signed. He explained the purpose of the counter-petition and said that the union wanted to receive their support if they still supported the union. He explained to some that there would be no vote if they had enough overlaps with those who had signed the petition and had also signed cards. Some people approached him to sign the counter-petition and one person refused to sign the counter-petition when asked by Mr. Dowsett if he would.

11. When Mr. Doucette talked to people about signing membership cards he had also told some of them that there would be a counter-petition at the end. Mr. Doucette expressed to those he spoke to about signing reaffirmations that he did not care if they had signed the petition but that if "you guys still want a union we have to have this". He explained the effect of the counter-petition to people saying that if they had signed the petition prior to this it would "kill" the petition and help the men get a union in, but gave no guarantees. He told others that they needed the counter-petition signed to "guarantee that the original card was still good." To one, who had not signed the petition, he said the legal department needed it, that he had to get this done.

12. Mr. Cadarette explained to the person who signed in his presence that the last thing signed counted; he had told other employees the same previously. This individual had told him that he had signed the petition.

13. Mr. Jameus, who had worked on all three campaigns and was a volunteer organizer, asked people if they wanted to reaffirm their support for the union. He told them it would nullify the petition and make their cards good. He did not ask anyone if they had signed the petition. He asked some people to sign the counter-petition who did not.

14. The large majority of signatures on the counter-petitions were received at people's homes or other places where the witness and the person signing were in a one-to-one situation. Many of the signatures were gained without prior appointment. Messrs. Dowsett, Doucette and Jameus spent a good deal of the last two days of the campaign driving around to members' houses, to see if they were available to sign a counter-petition. Eleven of the signatures, including three of the overlap signatures, were received at a restaurant frequented by the miners, where the organizers had made it known they would be during the last few days of the campaign. A number of employees approached the organizers, asking to sign the counter-petition, without being asked to do so. We have compared the testimony concerning time of signing with the shift schedule evidence. No issues arose from that exercise; it was confirmatory of the evidence given. The evidence established that the miners are required to function in English in the mine in filling out daily safety cards, and that those mentioned whose first language was not English, also spoke English.

15. For the purpose of our decision we have assumed to be true certain facts that Mr. Hollinger would have otherwise wished to have proved. These were: (1) that Mr. David LeBlanc, the employee representing the objecting employees throughout the hearing, was not connected with management; (2) The petition that he presented to the Board had no genesis with management and no involvement from management; (3) Management had no knowledge of the petition; (4)

The people who signed it signed voluntarily with very little pressure; (5) The signatures were gained by one individual petitioner visiting the employees' homes after work; (6) Mr. LeBlanc was not given three days off by the company to do the petition. He took three days off of banked time for which he did not have to ask permission. The union did not contest the voluntariness of the petition and took the position that these facts were irrelevant to any other issue. The objecting employees argued they were also relevant to our discretion to order a vote even if we found the reaffirmations to be voluntary.

Argument

16. The union asked us to rely on the counter-petition as the last voluntary statement of the intention of the employees. They submitted the petition was irrelevant as there were a sufficient number of signatures on the reaffirmation documents which overlapped those on the petition to reinstate the membership evidence of over fifty-five percent of the employees in the bargaining unit that the union had initially submitted. Counsel referred the Board to *Allan G. Cook Limited*, [1986] OLRB Rep. Sept. 1175 for a statement of the requirements for a finding of a voluntary counter-petition. The union submitted that since the post-court decision in *Re Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387 it has been clear that this case is not one in which a vote should be ordered, i.e., the fact that people changed their minds a number of times is not sufficient reason to order a vote. Counsel submitted that the Board's jurisprudence is clear: there is no room for considering the relative voluntariness of the various documents. Counsel argued that the reason the Board does not inquire into which document is more voluntary than another is that the Board has never been interested in why people signed any document as long as there was an atmosphere that provided for the voluntary expression. Union counsel also referred us to *Laidlaw Wire of Canada, Ltd.*, [1985] OLRB Rep. Oct. 1479 for the proposition that even if the people did not understand the full potential legal effect of the counter-petitions, that was not relevant if they voluntarily signed the document.

17. Counsel referred to *Uxbridge Beverages Ltd.*, [1982] OLRB Rep. June 961, *Leon's Furniture Limited*, [1982] OLRB Rep. March 404, *Dominion Paving Limited*, [1986] OLRB Rep. June 705, *T. Eaton Company Ltd.*, [1984] OLRB Rep. July 1015, as well as *Re. Royal Canadian Yacht Club and Hotel, Restaurant & Cafeteria Employees Union Local 75 et al.*, 129 D.L.R. (3d) 554, a decision of the Divisional Court, to support various aspect of the argument that there was no basis in this case to order a vote. Counsel submitted that we could presume that the employees were adults and understood what they were doing. Even if there were language difficulties, counsel submits that *Admiral Linen Supply Limited*, [1989] OLRB Rep. Feb. 90 stands for the proposition that the Board will not inquire into the level of understanding of English of the people signing membership evidence.

18. For the employer, Mr. Firman argued that certain circumstances suggested that the reaffirmation documents were not voluntary. He said the organizers would just show up at people's places without prearranged meeting and people would sign with little or no discussion. He suggested that the concept of confusion of these employees was relevant in a way different from the way the Board had addressed it in the past. He said it was possible that members of management were present in the restaurant when people signed and that would have raised the possibility that people signed the counter-petition to look good in the eyes of management, just as the union says they signed the petition for the same reason. He argued that because Mr. Dowsett had not told people that there was a possibility of a secret ballot and told some of them there would be no vote, he misrepresented the facts to the people since whether or not there would be a vote depended on how many had signed which document.

19. Counsel asked us to consider the following facts as going to the concept of voluntariness in addition to whether or not there was fear of management knowing whether a person signed: (1) the form of the actual revocation, (2) the number of times an organizer approached the person to sign, (3) how many and how many different organizers appeared and who they were, (4) how many campaigns had been waged in the past, (5) whether management members were present when the document was signed, and (6) particular to the present campaign the overlap with the last days of the Mine, Mill and Smelters Workers' Union campaign. In counsel's view, it was a very confusing time for the employees, as there had been several organizing campaigns, and that the Board is entitled to consider their confusion in deciding whether to exercise its discretion under section 7(2) to order a vote. He argued that the margin of support here, fifty-seven percent, is not a very large margin over the fifty-five percent cut-off in the *Act*. He submitted that such a slim margin is not much on which to go forward and that this is an additional consideration to be taken into account in deciding whether or not to order a vote.

20. Employer counsel also argued that the wording of the petition and the counter-petition meant that the counter-petition was not effective to reinstate the membership cards. He argued that the form of the petition in opposition to the certification included two operative paragraphs, (set out in paragraph 8, above) the first of which was fairly standard and the second one which was not. The second paragraph indicated that the individual intended to nullify any union card. Counsel argues that the counter-petition does not re-establish the membership card because its wording does not accomplish that and no new cards were signed. He argues that the reaffirmations only served to reaffirm the allegiance to the Steelworkers and do not indicate in any way that the union card or membership form is back in existence. He argues that there is then a vacuum: the card is gone. After the petition, he argues that there was no basis on which the reaffirmation could be based. Therefore, Mr. Firman asked us to find that there is not a valid application for certification supported by fifty-five percent membership evidence and to dismiss the application.

21. On behalf of the objecting employees, Mr. Hollinger argued that the Board should approach a counter-petition with the same stringent attitude as petitions in opposition to unions. He disputes the rationale of certain Board decisions which say that the considerations are different because of different economic power between employers and unions. He submits that a union has heavy economic power and that although they may not be able to hire and fire they can decide what grievances to process and make other important decisions affecting the economic lives of employees. He asked us to be entirely satisfied that this workplace wants the union. He emphasizes that fifty-one percent of the employees signed the petition in opposition to the union in the short time between the posting and the terminal date. This is contrasted to the situation in which two full-time organizers were dedicated to eking out their fifty-five percent over six months. Mr. Hollinger submitted that there is a plain line between confusion and misrepresentation and that the union had crossed the line here. He submitted that some of those who signed had not read the card and that there was no evidence of how many of them were illiterate. He said that the real meaning of the counter-petition was never explained because the union organizers avoided the word vote. They said things such as that the "legal department needed it," and on the rare occasions that someone would ask they would respond about the potential effects of the counter-petition on a vote. They never raised the issue of a vote themselves.

22. He submitted that because of the past history of this workplace the employees are aware they get a vote when they sign a petition because they had votes in the last two campaigns. He suggests that they would think the same even though this was a counter-petition: another petition would give them a vote. The miners are not educated in labour law and there was a heavy onus on the organizers to explain what it was they were signing, counsel submits. Although the

organizers said that it was support for the union they were seeking they have said the same in the past when asking employees to sign a union card and a vote had been arranged.

23. In a divided workplace such as this, Mr. Hollinger submitted that a vote is the way for the employees to express their true wishes. He suggested that they can outwardly express support for the union and then do something different in the secrecy of the ballot box and nobody could say anything about it. He suggests that the cases that deal with confusion are not ones where there were two previous certification applications and that this distinguishes this case on the facts. He emphasized that in his view the only fair thing to do was to order a vote. He said that in the context of the campaign where the union spent a long time getting the cards and then a petition was signed in two days at people's houses in a situation which management knew nothing about it, we should prefer the petition. He said that the fact that some of the organizers had spent four to five hours with individuals before they signed a union card would give people the impression that the union organizers will not leave and they would sign just to get them to leave.

24. In reply, the union argues that there was no misrepresentation, that in fact Mr. Dowsett was in a position to say that there would be no vote, in that the union could have withdrawn the application. Counsel submitted that the cases are clear that all that is necessary is reaffirmation of support for the union and that a more technical understanding than that is not necessary. Only in cases of fundamental misunderstanding of the purpose of the document would a vote be ordered, counsel argues, and this is not that case. Counsel suggested that the considerations proposed by Mr. Firman are simply not ones which the Board has considered relevant to the determination of voluntariness in the past and should not be adopted now.

25. As to Mr. Firman's arguments as to the wording of the two documents, counsel suggests that section 1(1)(e) of the *Act* defines a member and that the petitions submitted in this case do not change the fact that the union had fifty-five percent of the employees as members when it made this application. The effect of the petition is not to nullify the membership evidence and the Board has always held that a petition only casts doubt upon it. Counsel suggests that even if one were inclined to give weight to Mr. Firman's argument, the reaffirmation document says that it revokes support for the petition. If the petition nullifies the cards, then the nullification of the petition should restore the card.

Decision

26. The Board found the four witnesses to be credible. Their evidence was not challenged in any material respect on cross-examination or by the documents before the Board. We have found the facts on the basis of their evidence and the documents before us, in light of the submissions of the parties.

27. The respondent and the intervener maintained that there was misrepresentation involved in the counter-petition campaign and that the matter of a vote was not discussed with a sufficient number of potential signatories. In considering this argument, we note and agree with the statement of the Board in *Leon's Furniture Limited*, [1982] OLRB Rep. March 404 at paragraph 11 as follows:

11. The Board has drawn the line of regulation between salesmanship and improper conduct at fundamental misrepresentation, coercion and intimidation. ...

The Board has not attempted to lay down standards of conduct aimed at responding to confusion and misunderstanding. Rather, it has tried to strike

a balance between competing interests by censuring conduct that could deter, coerce or mislead the reasonable employee.

28. The four collectors of the counter-petitions made quite clear that their objective was to regain support for the union that might have been lost due to the petition circulated by Mr. LeBlanc. There is no obligation on supporters or opponents of the union to put the case for the other side when campaigning. The people organizing for the union were not obliged to present the case for the petitioners or for a vote, nor were the petitioners obliged to put the case for the union or automatic certification when soliciting signatures. The evidence before us does not persuade us that the union organizers made misrepresentations to potential signatories. That they did not explain all the possible outcomes of various combinations of numbers of signatures on the various documents is not something that is of concern to the Board. They made it clear to a number of employees that their objective was no vote; to all it was made clear that support for the union side was the purpose of the request for a signature. We are not persuaded that the reasonable employee would think that the counter-petition was a petition for a vote, as was suggested in argument. No one said that to any of the potential signatories, and the document is quite clear that it nullifies support for the petition. If the supporters of the petition explained their objective was a vote, the reasonable employee would be very clear on the objective of the counter-petition. Nor are we persuaded that the back-drop of the other campaigns makes misunderstanding more likely. To the contrary, we infer that there was a considerable amount of information available to these employees as a result of the several campaigns in a short period of time.

29. There was no evidence of language difficulties, and considerable evidence to the contrary. Thus we do not consider illiteracy or difficulty with English to be an operative factor in this case and it is unnecessary to discuss the jurisprudence in this area.

30. There was no allegation of intimidation or undue influence and the evidence persuades us that the signatures on the counter-petition were not gained through undue influence or intimidation. The evidence did not even disclose a great deal of salesmanship. We do not consider the evidence that the organizers arrived at some peoples' homes without appointments to be significant in the absence of any allegation or evidence that this involved anything improper, or even unusual.

31. Both the respondent and the intervener urged us to find that the Board standards are incorrect in that they include an idea that the standard for voluntariness is different for counter-petitions than for petitions in opposition to certification. Mr. Firman asked us to take into account the possibility of employees' signing to look good in the eyes of any management personnel who might have been in the restaurant when they signed. Whatever may be said of the countervailing power of the union in the employment situation, and we do not doubt that they have some economic power, their economic power is different and much more indirect than that of the employer. We see no reason to depart from the previous standards of the Board in determining the voluntariness of a counter-petition. We agree with the Board's remarks in *Allan G. Cooks Limited, supra*, that where there is no threat, intimidation, undue influence, misrepresentation or other conduct which would impair the ability of an employee to voluntarily express his/her wishes that a finding of voluntariness is in order. As well we agree with the comments in *Frito-Lay Canada Ltd.*, [1981] OLRB Rep. May 538 as follows:

While petitions and revocations have equal status in the sense set out above, the Board recognizes that in assessing the weight to be given to a revocation or "counter-petition" there are different considerations than in the case of a petition opposing the union. In the case of a petition, employee signatories are more likely to be sensitive to the perception of management involve-

ment, or the fear that a failure to sign may be communicated to their employer and could result in reprisals. In the case of membership evidence or revocations, however, support will seldom be solicited by individuals who can affect an employee's economic destiny, nor will there usually be any fear that a failure to sign a membership card or revocation will be communicated to the employer and could result in adverse employment consequences. (However, see *Veres Wire*, [1976] OLRB Rep. July 337 where the Board rejected certain union membership evidence because of the involvement of a foreman in the union's organizing campaign). Accordingly, the purpose of inquiry into the origination of a revocation statement is to determine whether there is any evidence of threats, intimidation, undue influence, misrepresentation, or other conduct which might impair the ability of an employee to voluntarily express his wishes. The concerns expressed in *Radio Shack* and *Pigott Motors* have no strict application to revocations or union membership evidence.

32. We see no merit in the argument that signatories might have been influenced to sign the counter-petition by the possibility of the presence of managerial personnel in the restaurant. This suggestion does not accord with the Board's experience of petitioners and counter-petitioners or the evidence in this case. The Board's experience, as expressed in the jurisprudence, is that such a tendency may be present at times in relation to petitions in opposition to unions, but not, in a normal situation, for petitions in support of unions. With a counter-petition, there is not the overlap in interest between the employer and the union that there is with petitions in opposition to the union that would provide a reason for employees to fear that the union might disclose to the employer the names of employees who signed.

33. We also find no merit in the submission that a narrow margin of support over 55 percent is a factor to be considered in ordering a vote. The Legislature has spoken on what is a sufficiently clear majority for automatic certification in providing for 55 percent, rather than a simple majority. There is no basis of which we were made aware for the Board to set the line somewhere else, and we decline to do so.

34. For these reasons, we find the counter-petition to be voluntary, a sufficiently reliable indication of the wishes of the employees at the time they signed it. Based upon the union's decision not to contest the voluntariness of the petition in opposition to the union, as well as the facts stipulated by Mr. Hollinger as set out above, we also find the petition in opposition to the certification of the union to be voluntary. We are therefore in possession of two voluntary statements of desire.

35. The relevant, overlapping signatures on the counter-petitions are all later than those on the petition in opposition to the certification of the union. In these circumstances, we are not inclined to exercise our discretion to order a vote. The Board's jurisprudence is very well established that it is the last voluntary statement of intention that will stand for the purposes of the Board's determination of the level of membership support on an application for certification. This is because in the previous cases, as in all the circumstances of the case before us, the counter-petition and the original membership evidence constitutes the most persuasive and reliable evidence of the true wishes of the employees. There is nothing so different about this case or the arguments made to warrant a departure from the established jurisprudence. The argument made that one should take the confusion of the employees to mean that a vote is necessary is one that has been heard and rejected on a number of occasions by the Board. This case is simply another example of the good reasons for the Board's jurisprudence as outlined in cases such as *Baltimore Aircoil Inter-*

american Corporation, [1982] OLRB Rep. Oct. 1387, *Leon's Furniture Limited*, *supra*, and the cases cited therein, and *Laidlaw Wire of Canada Ltd.*, *supra*, among others. In order to compare the relative voluntariness of the statements of desire, or to fix some meaning on each of the changes of mind that have taken place, one would have to inquire into the reasons for the employees' shifts. First of all, this would be virtually impossible to do without making a farce of the confidentiality requirements in section 111. Secondly, it would ignore the emphasis the statute places on membership cards as the method of determining employee wishes and whether employee support is in excess of fifty-five percent.

36. We have carefully considered Mr. Firman's argument as to the effect of the respective wordings of the petition and the counter-petition and do not find merit in it. The jurisprudence is extremely well established that the effect of a petition on the membership evidence is to put it in doubt, not to void it. This is why the maximum effect that is given to a petition is a vote. The Board, subsequent to the court decision in *Canadian Yacht*, *supra*, reaffirmed this in *T. Eaton Company Ltd.*, *supra*, and we agree with the Board's decisions in both those cases. Where the Board finds a voluntary relevant petition, and orders a vote, this does not mean that the union did not have fifty-five percent membership evidence. It simply means that there was sufficient doubt raised about the true intentions of those members to warrant the exercise of the discretion in section 7(2). Where that cloud on the evidence of membership support is removed by a voluntary counter-petition, there is no necessity for a vote.

37. In any event, we find that the wording of the counter-petition is sufficient to counter the wording of the petition. In removing support for the petition, an employee can be inferred to have removed support for all the wording in it, including the revocation of the membership card. Furthermore, in the circumstances of this case, this argument flies squarely in the face of the other arguments made by the respondent that the employees were so confused that they did not know the effects of the various documents they signed. If they were contemplating the legal niceties of the exact phrasing of each document and were therefore motivated to retract their card and then reaffirm their support for the union but not reinstate their card, they would be exercising a level of sophistication that is far above that argued for by the respondent.

38. The applicant challenged the inclusion on the list of employees of an employee named Brian McFarlane, an industrial electrical apprentice, on the basis that he was a technical employee (instrumentation and technician). However, the inclusion or the exclusion of this employee would not affect the right of the union to be certified nor the description of the bargaining unit. Thus we leave it to the parties to attempt to resolve this matter themselves.

39. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; May 2, 1991

1. I concur with the facts as stated by the Vice-Chair. However, I do not agree with the conclusions of the majority in their deliberations. I therefore dissent.

2. It should be noted that at this particular work facility, *Minnova Inc.*, there has been a number of union organizing drives in the past few years.

3. In the case of one organizing campaign the application for certification was withdrawn. In two other campaigns the Board directed votes be taken. The unions involved in these votes were defeated. We are now dealing with the fourth application for certification with respect to this unit in four years.

4. I am convinced that under the circumstances (i.e. the number of union organizing drives - petitions against the union representation - counter-petitions supporting the unions - two votes directed by the Board) that what these workers have been continually bombarded and saturated with over the past three years, has created an atmosphere of confusion that can only be cured by extending to these workers a democratic vote to freely express their desires.
 5. I would therefore have exercised my discretion and directed that a vote be taken.
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1364-89-R International Union of Operating Engineers, Local 793, Applicant v. **M. Pickard Construction Co. Ltd.**, Respondent v. Labourers' International Union of North America, Ontario Provincial District Council, Intervener v. Group of Employees, Objectors

Bargaining Unit - Certification - Construction Industry - Whether certain individuals should be included in bargaining unit for the purpose of the count - Gilvesy test adopted and principles enunciated by Board in *Wraymar Construction and Rental Sales* case applied - Certificates issuing

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *R. W. Pirrie* and *P. V. Grasso*.

APPEARANCES: *J. Slaughter* for the applicant; *J. Liberman* for the respondent; no-one appearing for the intervener or the objecting employees.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR AND BOARD MEMBER R. W. PIRRIE: May 17, 1991

1. At this stage of the proceedings in this application for certification we must determine which persons should be included in the bargaining unit for purposes of the count.
2. Before so doing, it is convenient to briefly capsulize the history of this application for certification and the decisions of the Board which have preceded this one.
3. This application for certification was filed pursuant to section 144(1) of the *Labour Relations Act* ("the Act") on August 28, 1989. Applications for certification by The Labourers' International Union of North America, Ontario Provincial District Council ("the Labourers") in respect of certain employees of the respondent (hereinafter referred to as "the employer" or "Pickard Construction") had also been filed. Timely petitions objecting to the certification of both this applicant ("the Operating Engineers") and the certification of the Labourers were also filed. In addition timely revocations were filed on behalf of the Operating Engineers. An unfair labour practice complaint was also filed by the Labourers. There was disagreement amongst the parties in respect of the appropriate description and composition of the bargaining units in the various applications, and numerous challenges to the lists of employees filed by the employer in reply to the applications. Both the Operating Engineers and the Labourers intervened in the applications for certification which had been filed by the other.
4. By decision of a different panel of the Board dated July 11, 1990, these matters were heard together. Upon agreement of the parties (as reflected in the decision dated July 11, 1990) it

was agreed that the Board would hear first the evidence and representations of the parties with respect to the voluntariness of the petitions and the unfair labour practice allegations.

5. We note that a Labour Relations Officer had been appointed by the decision of yet a different panel of the Board dated October 20, 1989. The Labour Relations Officer was authorized to inquire into and report to the Board in respect of the numerous challenges to the lists of employees filed in the various applications. That inquiry was conducted on various days commencing on November 14, 1989 and concluding on July 4, 1990. The Labour Relations Officer's report with respect to the various challenges consists of some 468 pages and numerous exhibits.

6. This panel of the Board heard the evidence and representations of the parties with respect to the voluntariness of the petitions and the unfair labour practice allegations over seven days. We concluded our hearing in respect of that aspect of the applications on November 27, 1990. By decision of the Board dated December 4, 1990, a majority of the Board with Mr. P. V. Grasso dissenting determined that the petition filed in opposition to this application for certification by the Operating Engineers was voluntary. The Board unanimously found the petitions filed in opposition to the Labourers' applications not to be voluntary and subsequently certified the Labourers. In our decision dated December 4, 1990, the majority (Mr. Grasso dissenting) also determined that Mr. Jim McCutcheon was an employee and ought not to be excluded from the appropriate bargaining unit by reason of section 1(3)(b) of the Act.

7. A request for reconsideration of that decision was dismissed by the majority of the Board by decision dated February 27, 1991.

8. As a result of the finding that the petition was voluntary, it became necessary to hear the evidence and representations of the parties with respect to the voluntariness of the timely revocations which had been filed by the Operating Engineers. We conducted a hearing with respect to that issue on April 8, 1991. At the conclusion of the evidence and submissions we rendered an unanimous oral ruling that the revocations were a voluntary expression of the wishes of the employees who had signed them.

9. We note that it was not until December 7, 1990 that the parties ultimately agreed upon the description of the bargaining unit in both this application and the applications filed by the Labourers. Having regard to that agreement and the provisions of section 144(1) of the Act we find the appropriate bargaining unit in this application to consist of all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors of the construction industry in the County of Grey engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman.

10. Our decision herein addresses which of the employees are to be included in that bargaining unit for purposes of the count.

11. We note that over the course of these protracted proceedings the parties were able to resolve a number of challenges to the list. As a result the only individuals whose inclusion on the list remains in dispute are:

- (a) Andrew McCutcheon
- (b) Jim McCutcheon
- (c) Steve McCartney

- (d) Dale Cuyler
- (e) Dave Thomson

12. In making our determination as to whether these individuals should be included in the bargaining unit, or excluded from it, we adopted and applied what has come to be known as the "Gilvesey test" (see *Gilvesey Enterprises Inc.*, [1987] OLRB Rep. Feb. 220) and have focused on the date of application (see also *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41).

13. In addition, and notwithstanding counsel for the applicant's submissions to the contrary, we have also applied the principles enunciated by the Board in *Wraymar Construction And Rental Sales Ltd.*, [1989] OLRB Rep. June 682 to assist in our determination whether the "mechanics" employed by Pickard Construction (Jim McCutcheon and Andrew McCutcheon) should be included in the bargaining unit. We agree with and adopt the reasoning of the Board in *Wraymar Construction and Rental Sales Ltd.*, *supra*, and *Bill Brownlee Excavating Ltd.*, [1988] OLRB Rep. April 364, application for reconsideration dismissed [1988] OLRB Rep. July 645.

14. With respect to the challenges relating to persons characterized by the respondent as independent contractors we have considered and applied the Board's jurisprudence regarding the issue of whether persons are dependent or independent contractors including *Airline Limousine*, [1988] OLRB Rep. March 225, *Algonquin Tavern*, [1981] OLRB Rep. Aug. 1057, *Atway Transport Inc.*, [1989] OLRB Rep. June 540, *Craftwood Construction Co. Ltd.*, [1980] OLRB Rep. Nov. 1613 and the decisions referred to therein.

15. Having regard to the officer's report and the representations of the parties and the jurisprudence already referred to, we find the following:

16. On the application date Mr. McCartney reported for work at 7:00 o'clock. He travelled to the work site and for the first two hours of his working day from 7:30 to 9:30 he cut sod and took out a hedge on the property. For the next two hours from 9:30 to 11:30 he dug a trench operating equipment which falls within the jurisdiction of the operating engineers. Thereafter and for the remainder of the day he spent his time manually digging, shovelling, and raking gravel to backfill. As a result of the configuration of the site on which he was working and the proximity of the houses on that site he did not operate any equipment to perform this backfill work on that day.

17. In our view, Mr. McCartney did not spend the majority of his time performing work in the bargaining unit on the date of application. We find that *Steve McCartney* was not an employee in the bargaining unit on the application date. Mr. McCartney was hired as a labourer and on the date of application he spent the majority of his time performing labourers work.

18. On occasion Mr. McCartney does operate equipment which the applicant asserts as being within the work jurisdiction of the operating engineers including a skid steer loader. The employer does not concede that the skid steer loader falls exclusively within the operating engineers bargaining unit although counsel conceded that the classification of skid steer loader appears in a number of collective agreements which the operating engineers have with contractors. It was the employer's position that the skid steer loader was a tool of the trade.

19. In our view, the operation of a skid steer loader is work within the bargaining unit applied for. That is not to say that the operation of the skid steer loader falls *exclusively* within the operating engineers' work jurisdiction. The work jurisdictions of trade unions are not air tight compartments. Overlap of work jurisdiction and competing claims for work by trade unions is not unusual as the numerous jurisdictional complaints filed with the Board attests. The fact that another trade union may equally claim the operation of the skid steer loader as falling within its

jurisdiction does not resolve the issue as to whether the operation of the skid steer loader is work within the work jurisdiction of the operating engineers. The question in this application is whether an individual can, in the particular circumstances, be said to fall within the bargaining unit applied for when operating a skid steer loader. It is not whether the assignment of that work to the operating engineers would be reversed by the resolution of the jurisdictional complaint arising out of competing claims for that work. It is neither appropriate nor necessary to determine such a jurisdictional dispute in this certification application. (see *George and Asmussen Limited*, [1970] OLRB Rep. Oct. 783; *Sample-Gooder Roofing Ltd.*, [1983] OLRB Rep. Nov. 1908 and *H & D Construction*, [1987] OLRB Rep. Dec. 1495.) This is especially so where, as here the evidence does not unequivocally establish that Mr. McCartney operated a skid steer loader at all on the date of application.

20. *Dave Thomson* is an owner operator who clearly spent the majority of his time on the date of application performing bargaining unit work. Counsel for the employer asserted Mr. Thomson was an independent contractor. We disagree. We find that Mr. Thomson is a dependent contractor. Although there are some factors which point towards independence, having particular regard to the economic dependence of Mr. Thomson, his full-time engagement with Pickard Construction during the construction season, and the conditions of that engagement and its similarity to the conditions under which persons who are clearly employees of Pickard Construction work, we find that Mr. Thomson is a dependent contractor within the meaning of subsection 1(1)(h) and an employee pursuant to section 1(1)(i) of the Act. Mr. Thomson is therefore properly included on the list of employees filed.

21. *Dave Cuyler* is also an owner operator who we find is a dependent contractor and an employee pursuant to subsection 1(1)(i) of the Act. We find that Mr. Cuyler was performing the work of an operating engineer on the application date. We find however, that he did not on the date of application spend a majority of his time performing bargaining unit work in either the industrial, commercial and institutional sector of the construction industry or in any other sector of the construction industry in the geographic area to which this application relates. Mr. Cuyler was at work in the County of Bruce on the date of application. Bruce County falls within Board Area 3 and not Board Area 28 to which this application relates. Mr. Cuyler was therefore not at work in the bargaining unit on the date of application and ought not to be included on the list of employees.

22. The issue as to whether the mechanics employed by Pickard Construction should be included in the bargaining unit is not at all clear-cut or easily determined. Before examining the nature of the work performed by the disputed individuals it is therefore appropriate to provide a brief review of certain facts and circumstances which have a general bearing upon that determination.

23. Pickard Construction has a three-bay garage. That garage or "shop" is situated within the geographic region to which this application applies. Pickard Construction employs three individuals as mechanics. The inclusion of two of those mechanics in the bargaining unit is in dispute. The parties are agreed that the third individual classified as a "small engine mechanic" is properly excluded from the bargaining unit. As that classification title suggests the small engine mechanic maintains and repairs small equipment such as portable waterpumps, earth compactors, chain saws, tampers, etc. In addition, the small engine mechanic repairs and maintains the small equipment of another company owned and operated by Mr. Pickard called Sound Rentals.

24. In addition to this "small equipment", Pickard Construction owns a number of trucks. It also owns various pieces of equipment the operation of which clearly fall within the jurisdiction

of the operating engineers. The list of equipment and trucks itemized in the Labour Relations Officer's report includes approximately eight or nine back hoes, two small and four large ride-on ditchwitches, one walk behind ditchwitch, one skid steer loader, one bulldozer, two reel trucks, three tandem trucks, four single axle trucks and approximately thirty to forty pick-up trucks. Counsel for the applicant argued, *inter alia*, that the disputed mechanics were primarily truck mechanics and were not mechanics "*primarily* engaged in the repairing or maintaining" of "cranes, shovels, bulldozers or similar equipment" and therefore they did not fall within the bargaining unit. That submission, although persuasive, is not borne out by the evidence of the work performed by either Mr. Jim McCutcheon or Mr. Andrew McCutcheon on either the application date or generally.

25. *Andrew McCutcheon* is an apprentice mechanic. On the date of application he worked ten hours. He spent the first two hours of his work day (10:00 a.m. to 12:00 p.m.) in the shop servicing a backhoe. Thereafter, from 12:00 p.m. to 2:00 p.m. he serviced a backhoe "on the road" (i.e. at a construction site). The amount of time actually spent servicing the backhoe was forty-five minutes while the remainder of that two-hour period was travel time to and from the site. Mr. McCutcheon indicated that for reasons of economy and efficiency it was determined to service this backhoe on-site rather than bringing it back to the shop for servicing.

26. From 2:00 p.m. to 3:30 p.m. Mr. McCutcheon delivered a backhoe bucket to the crew at another job site. The backhoe bucket at this site needed to be replaced with a different one and Mr. McCutcheon was sent out to do that. Fortuitously, before leaving the shop, Mr. McCutcheon was advised that the crew also needed a compressor at the site. He therefore hooked up the compressor and delivered it to that site. The travel time to and from the job site was approximately one hour while the removal and replacement of the backhoe bucket took approximately thirty minutes.

27. After returning from that job site, Mr. McCutcheon spent two hours working on a single axle-dump truck at the shop. Thereafter, he spent two and a half hours working on a ditchwitch with a full size trencher. During this two and a half hours Mr. McCutcheon also had his half-hour break. For the last half-hour of this shift he performed a "walk-around" the yard "service check" noting mileages on the trucks and determining which trucks needed to serviced. He also changed the oil on a three-quarter ton truck.

28. Mr. McCutcheon could not estimate with any degree of certainty how much time he spent in the shop and how much time he spent "on the road". He indicated that was dependent on other factors stating in his evidence:

It really depends. During the season you can't really say on a day to day, like take the whole year and say well I spent the majority of my time, I spend the most of my time in the shop. In the summer time it is different because you have service calls and everything else. So you never know if you're going to be in the shop or out of the shop. The winter time, I would have to say that you know 80% of your time is spent in the shop. You still have some service calls but not as many.

Sometimes it's very, it's more inconvenient to bring a piece of equipment into the shop then it is for us to travel out to it and for all the time it takes to drop the oil and fill it back up again, you can have it done in no time. So in that case it would have been, you know they would have been on the job for maybe three or four weeks or whatever and it was easier for us to go out to it and dump the oil, then it was to have it floated in and changed here.

29. Similarly, Mr. McCutcheon was unable to differentiate between the time spent working on machinery such as backhoes, bulldozers, etc. and the time spent working on trucks.

30. Counsel for the applicant submitted that the actual time which Mr. A. McCutcheon spent servicing, repairing or maintaining equipment ought not to include the time spent travelling

to and from the site. He asserted that with respect to the removal and replacement of the backhoe bucket, that time was only thirty minutes. The remainder of the time was travel time to deliver the compressor. With respect to the on-site service of the backhoe, counsel noted that the actual time spent servicing the backhoe was forty-five minutes and the remainder of the time was travel time. He argued that the Board ought not to piggy-back travel time or the work of "driving" onto the work of the operating engineer which falls within the bargaining unit. In support, he referred to *Bill Brownlee Excavating Limited*, *supra*, *On-Grade Excavating and Drainage (Niagara Limited)*, unreported decision of the Board dated October 14, 1988 and *Vanson Construction Limited* unreported decision of the Board dated October 24, 1990. These cases variously stand for the proposition that driving a float truck, fuel truck, fuelling or driving to deliver parts is not work within the bargaining unit.

31. In our view, these cases are readily distinguishable and do not apply. We agree that "driving" (whether its a fuel truck, pick-up truck or float) and "delivery" (whether delivery of parts or fuel) is not work within the operating engineers' bargaining unit. In our view, however "driving" and "delivering" in those instances is separate and distinct from "travel time" to and from a job site to perform work within the bargaining unit.

32. Travel time which necessarily arises as a result of the performance of work which clearly falls within the bargaining unit is work within the bargaining unit. One cannot perform on-site maintenance or repair without travelling to the site. In that instance the travel is an integral part of the job functions of the mechanic. To hold otherwise could lead to the strange result that a mechanic who spent the entire day travelling to various sites would not be included in the bargaining unit because the travel time outweighed the time actually spent on repairs or maintenance.

33. The delivery of the compressor is clearly not work which falls within the bargaining unit. We are of the view however, that the primary purpose for McCutcheon's attendance at the site was the need to remove and replace the backhoe bucket. The delivery of the compressor was an incidental purpose. Mr. McCutcheon was initially required to go to the site to remove and replace the backhoe bucket not to deliver the compressor. The travel time to the site was an integral part of his duty as mechanic to remove and replace the bucket of the back hoe on the site.

34. We note also that in our view the time which Mr. A. McCutcheon spent on the repair of the ditchwitch also should be included in the calculation as to whether Mr. McCutcheon spend the majority of his day performing work in the bargaining unit. Notwithstanding any submissions to the contrary, in our view the work of maintaining or repairing a ditchwitch is work within the bargaining unit applied for as the operation of the ditchwitch itself is also work within the bargaining unit applied for. As was the case with the skid steer loader, that is not to say that operation of the ditchwitch falls exclusively within the work jurisdiction of the operating engineers. Our comments with respect to the work jurisdiction of the various trade unions in relation to the skid steer loader apply equally to the operation of the ditchwitch.

35. On the basis of all the evidence we find that Mr. A. McCutcheon is commonly associated in his work with on-site employees in the bargaining unit, and on the date of application spend a majority of his time performing bargaining unit work. He should therefore be included on the list of employees.

36. *Mr. Jim McCutcheon* is the employer's chief or head mechanic. He is a licensed, class "A" mechanic. He does not have a heavy equipment endorsement to that license. Mr. Jim McCutcheon has no recollection of the work he actually performed on the date of application although he knows he worked eight hours on that day. In his examination by the labour relations officer he

noted that “everyday is a little different but our job is to repair and keep this equipment running and that’s what we do.”

37. Mr. McCutcheon does on occasion leave the shop either to pick up parts or “to repair a piece of equipment that is broken down at [sic] the field.”

38. In our view, the following exchange of questions and answers typifies Mr. Jim McCutcheon’s responsibilities to repair equipment on-site.

Q. What would happen when you receive the report of broken-down equipment in the field, what would your responsibilities then be?

A. My responsibilities would be to pack-up the tool box and take whatever parts I felt necessary and repaired it.

Q. So you packed up the tool box here at the shop and then what would you do?

A. I would go to the site and repair it if I could. If it couldn’t be repaired we would bring it back to the shop.

Q. You said that this is the type of occurrence happens almost everyday?

A. If you average it out, it would happen everyday I’m sure.

Q. Would your evidence then be that you leave the shop almost on a regular daily basis to attend to repairs in the field?

A. Either I or one of the other men, yes.

Q. Specifically, the question was do you, Jim McCutcheon, leave the shop everyday to attend down-site equipment repairs?

A. I don’t everyday, but some days I might be out five times, so it’s difficult to tell.

39. In further examination by the applicant and respondent, Mr. Jim McCutcheon indicated he would be on-site more often during the summer months of the construction season than at other times of the year. He also indicated that on-site work would not take more than one hour on any job site visit because “if it takes longer than that, it’s a major job and it should come in the shop.”

40. There is no evidence to indicate the amount of time Mr. McCutcheon spends on-site as opposed to the time he spends in the shop.

41. We find the evidence with respect to how much time he spends working on trucks as opposed to such heavy equipment as back-hoes, bulldozers, etc. to be equivocal. In examination by counsel for the employer Mr. McCutcheon could not place an estimate on those figures. When questioned by counsel for the trade union, he estimated two-thirds of his time “was spent on trucks and the rest on the equipment.”

42. On the totality of the evidence we therefore find Mr. McCutcheon works both in the shop and on job sites, as required, repairing the respondent’s construction machinery. On balance, we find that he is “commonly associated in his work for bargaining with on-site employees” and was so employed on the date of application. (See *Bill Brownlee Excavating Limited*, *supra*, and *Wraymar Construction and Rental Sales Limited*, *supra*. We find that he is properly on the list of employees.

43. As a result of the agreement of the parties and the Board's findings herein we find the following to be the list of employees in the bargaining unit.

1. Gord Croft
2. Jerry Henry
3. Ron Henry
4. Larry Hillis
5. Tom McDonald
6. Doug Marshall
7. Jim McCutcheon
8. Terry Nicoll
9. Jim Pringle
10. Roger Schoonjans
11. Andrew McCutcheon
12. Dave Thompson

44. We note that the Labourers did not make any submissions to this Board to the status of Steve Farrow, Steven McCartney and Ray Nickason. The Labourers withdrew from active participation in this proceeding on December 7, 1990 when the Board indicated that as a result of our finding that the petitions circulated in opposition to the Labourers' applications were not voluntary the Labourers would be granted certificates covering the employees in the bargaining units for which they had sought to be certified. The determination by the Board with respect to the status of Messrs. Farrow, McCartney and Nickason did not affect the Labourers' right to be certified and as a result the Labourers took no position regarding the status of those individuals. Counsel for the Labourers requested however that the Board note that the Labourers did not participate in the litigation regarding the status of these three individuals and that their non-participation was "without prejudice" to any position the Labourers might take in any future matter regarding the issue of the status of these individuals. The employer and applicant in this proceeding subsequently agreed that Steve Farrow and Ray Nickason should not be included on the list of employees in this bargaining unit. We have determined that Steve McCartney also should not be included on that list.

45. We also note that in view of the final list of employees and our finding that the revocations were voluntary, the voluntary petition filed in opposition to this application for certification by the operating engineers was no longer numerically relevant. There was an insufficient overlap between the number of employees for whom the applicant filed membership evidence and the number of employees who had signed the petition (and who had not later revoked their signatures on the petition and affirmed support for the applicant) so as to cause the Board to doubt whether the applicant continued to have the support of more than fifty-five percent of the employees in the bargaining unit as of the terminal date.

46. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on July 13, 1978, the designated employee bargaining agency is the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers.

47. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 12, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Rela-*

tions Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

48. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the designated employee bargaining agency named in paragraph 46 above in respect of all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman.

49. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all employees of the respondent in all sectors of the construction industry in the County of Grey, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman.

DECISION OF BOARD MEMBER P. V. GRASSO; May 17, 1991

1. I concur with most of the findings and conclusions in the decision, but I am unable to agree with the decision to include Mr. Jim McCutcheon on the list of employees. The reason for my decision is that the evidence reveals the following facts:

- a) Mr. McCutcheon has no recollection of the work he actually performed on the date of application;
- b) He does not go out every day on work-sites to repair equipment and when he does go to a work site his visit would not take longer than one (1) hour;
- c) Mr. McCutcheon estimated that he spends two-thirds of his time repairing trucks.

2. The above evidence is indicative of the work that he generally performs when you look at the list of equipment. In addition to some small equipment the company owns:

8 or 9 back hoes
2 small ride-on ditchwitches
4 large ride-on ditchwitches
1 walk behind ditchwitch
1 skid steer loader

- 1 bulldozer
- 2 reel trucks
- 3 tandem trucks
- 4 single axle trucks
- 30-40 (approximately) pick-up trucks

3. Accordingly, based on all the evidence, I find that Mr. Jim McCutcheon was not an employee in the bargaining unit on the date of application.

1820-90-R Graphic Communications International Union Local N-1, Applicant v. Moore Corporation Limited, Respondent v. Group of Employees, Intervener

Certification - Evidence - Practice and Procedure - Witness - Board ruling that witness in non-pay inquiry may consult with and be advised by counsel during course of his testimony - Board directing witness to produce documents in his possession or control containing twenty original signatures - Board declining to compel witness to create twenty specimen signatures as requested by union counsel for use by expert witness

BEFORE: *S. A. Tacon*, Vice-Chair, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

APPEARANCES: *Stephen Krashinsky* and *Joe Hann* for the applicant; *R. Ross Dunsmore* and *Elizabeth Cooper* for the respondent; *Kevin Coon* for the intervener.

DECISION OF THE BOARD; May 22, 1991

1. This is an application for certification in which there are several matters in dispute. The first matter being heard is a non-pay allegation, namely, that Mark Hyland did not pay the \$1.00 in connection with his application for membership in the union. This decision deals solely with an issue which arose during the cross-examination of Mark Hyland by counsel for the union.

2. The parties filed written representations with the Board by the dates specified. As directed by the the Board without objection, Mark Hyland received copies from the parties of those representations. Given the last date for representations and the date the hearing is scheduled for continuation, the Board gives its ruling with brief reasons. The Board does not regard it as necessary to set out the parties' submissions.

3. The questions on which the Board received representations may be stated as follows:

- (a) whether Mark Hyland may consult with and be advised by counsel during the course of his testimony;
- (b) whether the Board has the authority and/or should compel Mark Hyland to create twenty specimen signatures as requested by union counsel for use by an expert witness in comparing those specimen signatures with those on the application for membership, given Mark Hyland's testimony that the third signature which appears on that membership application is not his;

- (c) whether the Board has the authority and/or should direct Mark Hyland to produce, at the next hearing, documents in his possession or control containing twenty original signatures which he acknowledges are his, again, as requested by and for the use stated in (b).

4. With respect to (a), union counsel conceded that section 11(1) of the *Statutory Powers Procedure Act* permits a witness to consult with and be advised by counsel during the course of his testimony. The Board agrees that the *Statutory Powers Procedure Act* disposes of this question in the affirmative. Mark Hyland, as noted, has received copies of the parties' submissions and is directed to be served with a copy of the Board's decision so that he may, if he so chooses, take advantage of that right prior to the next day scheduled for hearing.

5. With respect to (b), assuming (without deciding) that the Board has the authority to give the direction sought, the Board declines to do so given its disposition of (c).

6. With respect to (c), the Board considers that the Board has the authority to grant the direction sought and that it would be appropriate to do so at this time to facilitate the hearing and avoid unnecessary delay. Accordingly, the Board directs Mark Hyland to produce, at the next hearing, documents in his possession or control which contain twenty original signatures which he acknowledges are his and which documents are of a nature which could be filed with the Board for the purpose sought by counsel for the union.

7. This matter is referred to the Registrar in accordance with the foregoing. As noted in paragraph 4, a copy of this decision is to be served on Mark Hyland.

1851-90-U Northfield Metal Products Ltd., Complainant v. Albert Parsons, and Glass, Molders, Pottery, Plastics & Allied Workers International Union, Respondents

Health and Safety - Remedies - Settlement - Unfair Labour Practice - Parties settling Occupational Health and Safety Act complaint on basis of money payment to union - Settlement terms confidential and settlement providing that failure to maintain confidentiality will result in union reimbursing employer in full - Employee and union later disclosing that complainant had accepted cash settlement - Employer alleging breach of settlement - Complaint allowed and union directed to reimburse employer

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *R. W. Pirrie* and *H. Kobryn*.

APPEARANCES: *Irwin A. Duncan* and *Gary Becker* for the applicant; *Ian Anderson* and *Ross Armstrong* for the respondents.

DECISION OF THE BOARD; May 14, 1991

1. This is a complaint under section 89(7) of the *Labour Relations Act* alleging a breach of a settlement.
2. These parties have had a difficult and turbulent bargaining relationship. Some of the

details of their interaction have been set out in prior decisions of the Board: see *Northfield Metal Products Ltd.* [1989] OLRB Rep. Jan. 57; [1990] OLRB Rep. Mar.302; [1990] OLRB Rep. Sept. 939.

3. In its decision of January 1989, (*supra*) the Board certified the respondent union to represent a unit of employees of the applicant company. In April, 1989, a dispute arose between one of the employees, Albert Parsons, at the time the President of the union local at Northfield Metal, and the company, and as a result Parsons left work. He subsequently filed a complaint pursuant to section 24 of the *Occupational Health and Safety Act*, with the full support of the union, in which Parsons alleged that he had been discharged by the company contrary to the provisions of that Act.

4. The complaint filed by Parsons was ultimately settled, prior to a hearing. At that time, numerous section 89 complaints alleging unfair labour practices committed by the company were pending, and the parties were still negotiating their first collective agreement. Minutes of Settlement were signed and filed on July 5, 1989, and read as follows:

Minutes of Settlement

The parties in the above matter have met and agreed to resolve their differences in the following manner:

The respondent employer hereby denies any and all allegations arising from this complaint, and any financial obligation related thereto; notwithstanding the respondent employer's position in item 1 above, and without prejudice to that position the respondent employer is prepared to:

- a) immediately make a payment in kind to the complainant's representative in exchange for a receipt from the complainant's representative;
- b) provide a letter to the complainant regarding his employment with the respondent, i.e. date of hire, positions held, date of resignation;

The complainant hereby requests leave of the Board to withdraw the Occupational Health and Safety, section 24 complaint, OLRB File # 0359-89-OH, and the complainant and the complainant's representative further undertake that the circumstances of this matter shall not form the basis of any further complaint or action under the Occupational Health and Safety Act or the Ontario Labour Relations Act;

The complainant hereby acknowledges that these Minutes of Settlement are confidential, and are to be kept between the parties to this complaint, and cannot be revealed to any other party, person or source whatsoever; and further the complainant agrees that this settlement is full compensation, and recognition of any and all liabilities of any kind whatsoever, arising out of or in any way related to his employment by Northfield Metal Products Ltd., and his resignation therefrom, and for his representation by the Glass, Molders, Pottery, Plastics and Allied Workers International Union, Local #280. Failure to maintain the confidentiality of this settlement will result in the complainant's representative reimbursing the respondent in full.

Signed and dated this 5th day of July, 1989, at Kitchener.

 "Albert Parsons"
 Albert Parsons
 Complainant

 "Vincent Bowman"
 Northfield Metal Products Ltd.
 Respondent

 "Ross L. Armstrong"
 GMP International Union
 complainant's representative

As can be seen, both the complainant and the complainant's representative signed the settlement

document, and it contained provisions dealing with maintaining its confidentiality. It is these confidentiality terms that are in issue.

5. The settlement terms were fully implemented by the parties. Parsons did not return to work and his occupational health and safety complaint was withdrawn. Parsons received a letter of reference. The Minutes of Settlement stated that the company was to immediately make a "payment in kind" to the complainant's representative. In fact, the arrangement was for payment of \$7500.00 to the union. This amount was paid to the union, and both the union and Parsons provided a receipt.

6. Although Parsons did not return to work, numerous employees asked management what had happened to him. The employer's representatives responded that the matter had been settled to everyone's satisfaction.

7. Approximately eight months later, in early February, 1990, the parties had still not negotiated a first collective agreement, a first contract application pursuant to the provisions of section 40a of the Act was pending, as was at least one section 89 complaint brought by the union against the company, and some of the employees were engaging in a decertification campaign. Around February 2, 1990, a reporter for the Kitchener-Waterloo Record phoned Parsons and asked him about the circumstances under which he had left the company. Parsons said that given the time it would have taken to have resolved his occupational health and safety complaint at the Labour Board, and because the union couldn't guarantee his job, he had accepted a cash settlement from the company and had quit. Although asked by the reporter, Parsons refused to disclose any other details about the settlement. The reporter then phoned the President of the company, but he refused to comment on the Parsons complaint or its settlement. The next day the newspaper published the reporter's article about the decertification campaign at the company. Included in the article was Parsons' statement about having accepted a cash settlement from the company and quitting.

8. Also on February 3, 1990, Ross Armstrong, the union's Director, phoned the main petitioner in the decertification campaign in an effort to convince the petitioner to abandon his decertification attempts and to support the union instead. During his conversation with the petitioner, Armstrong said that the company had made a deal with Parsons and that Parsons had quit for a sum of cash. Armstrong used this as an example of how a union was necessary to protect employees.

9. Officials of the company read the newspaper article that contained Parsons statements. They also subsequently learned about the conversation between Armstrong and the petitioner. They quickly took steps to seek recovery of the \$7500.00 that had been paid. At the next negotiation session, they requested repayment of the \$7500.00. When the union refused, the company commenced action in the courts for recovery of the money. The court ultimately dismissed the company's action, on jurisdictional grounds, on July 11, 1990. On or about October 16, 1990, the company filed the instant complaint pursuant to the provisions of section 89(7) of the Act.

10. Section 89(7) of the Act reads as follows:

(7) Where the matter complained of has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person

or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

11. The company argues that Parsons and the union, through Armstrong, both signatories to and bound by the Minutes of Settlement, breached the confidentiality requirement contained in that settlement, and by the very terms of the settlement the union was required to pay back \$7500.00 to the company. In response, the union argued that Parsons and Armstrong had stated that Parsons, not the union, had been paid a sum in cash. They did not disclose that the union had been paid any money, and the Minutes of Settlement had indicated that payment was to have been to the union. Therefore, submitted the union, there had not been a breach of the confidentiality terms of the Minutes of Settlement, for no term had actually been disclosed. The union further submitted that the confidentiality requirement applied only to Parsons, since in the settlement, only “the complainant” had agreed to keep the settlement private. There was no requirement, by the very terms of the settlement, that the union maintain its confidentiality. Alternatively, assuming a breach had occurred, the union submitted that because of the delay in bringing the instant complaint, the Board ought to decline to grant any remedy. In this respect, the union noted that the delay between the breach of the agreement, in early February, 1990, until the instant complaint was filed in October, 1990, was approximately eight months. Even if the period before the court dismissed the civil action on July 11, 1990, was not taken into account, there would remain a three month delay between the dismissal of that action and the filing of the instant complaint. In these circumstances, the union argues the Board ought to dismiss the complaint. Finally, the union argues that the Board has a general discretion with respect to the appropriate remedial response, and in the instant circumstances, no remedy ought to be provided. The union submits that there has been no evidence of actual damage to the company from any breach, the tenor and substance of the newspaper article was adverse to the union’s interest and the company did not suffer in that respect, and in any event only a minor technical breach of the settlement occurred. The union therefore asks that the matter be dismissed by way of remedial discretion.

12. We do not consider that the delay in filing the instant complaint was such that we ought to exercise our discretion to dismiss the complaint. Immediately upon learning of the statements of Parsons, the company raised the matter with the union and indicated that it wanted repayment of the \$7500.00 according to the terms of the settlement itself. It then quickly sought to recover the funds through legal process. The delay between the initial demand and the time of filing the instant complaint was not so long, in all the circumstances, that we will dismiss the complaint on this basis.

13. We turn next to consider whether the confidentiality requirement in the settlement agreement has been breached. We need not determine whether the terms of the settlement bound only Parsons to maintain its confidentiality, or whether both Parsons and the union were so bound, since in the event both Parsons and the union, through its Director Armstrong, made similar statements about the settlement.

14. Settlement is perhaps the single most important method by which labour relations disputes are resolved in the Province. And this reality is particularly true with respect to proceedings before the Ontario Labour Relations Board. As the Board wrote in the *Lambton County Board of Education* [1987] OLRB Rep. Oct. 1277:

The purpose of section 89 is to secure a prompt, final, and binding resolution of unfair labour practice complaints. The Act expressly recognizes and endorses the settlement of such complaints without a formal Board hearing and decision. The provisions of section 89 are intended to facilitate settlements. Under section 89(7), where the matter complained of in the section 89 complaint has been settled, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties who agreed to the settlement. Indeed, section 89(7) makes non-compliance with a written settlement a breach

of the Act. Each year, trade unions, employees, and employers file thousands of applications or complaints before the Board. A large majority of them are settled. Sometimes the settlement favours a trade union or an employer. Other times it favours an employee. Usually it represents a compromise under which the parties neither achieve as much nor risk as much as they would by proceeding to a hearing before the Board. The parties generally arrive at a settlement in order to avoid the cost and uncertainties of litigation. The orderly resolution of Board proceedings and the efficacy of the settlement process would be gravely prejudiced if, having signed Minutes of Settlement, the party could afterwards repudiate the settlement ...”

15. Settlement often involves a compromise. It is a compromise that the parties themselves have evaluated and have endorsed. Many settlements include the payment of compensation by an employer to employees or the union. Many of these would no doubt never have been finalized if the employer could not have been assured that no liability or blame could be attributed to the employer. Similarly, such “without prejudice” settlements would often be of little utility if they were not kept confidential. It is not difficult to see why, in a particular circumstance, an employer might be willing to settle a complaint with payment of compensation to a complainant, but only if liability is not attributed and only if the community and other employees do not learn that the company has agreed to pay compensation. The employer’s fear is that the disclosure of such a payment, apart from the amount of the payment, might alone undercut the efficacy of the denial of liability, and might also lead other employees or unions to file further complaints, in the belief that the employer will settle such complaints with cash. That is why some parties insist on confidentiality as a condition of any settlement. But in any event, the parties themselves determine the terms of a settlement, not the Board. It would be counterproductive to the overall efficacy of the settlement process for the Board to evaluate the parties’ motivations or the means and terms of particular settlements.

16. The same concerns lead the Board to protect the settlement that the parties have reached. Where the settlement is clear, parties should not expect to be allowed to depart from the terms they have agreed to, or to be relieved from the consequences of their settlement. If it were otherwise, the settlement process, its importance in the scheme of the Board’s mandate and operation, and its importance to the ongoing labour relations environment in the Province would be seriously undercut, if not destroyed.

17. Here, the parties agreed that the settlement terms remain confidential. We conclude that the statements revealing that the company had settled the occupational health and safety complaint by way of a cash payment were in breach of the confidentiality requirement contained in the Minutes of Settlement. We so find even though Parsons and Armstrong said that the money had been paid to Parsons, although the settlement required payment to the union. What is critical is that they revealed that the company had paid cash to settle the complaint between Parsons and the company. It would not have been a breach of the confidentiality requirement to have disclosed only that the matter was settled, as the employer had. But by indicating that the employer had agreed to a money payment, Parsons and Armstrong were revealing a term of the settlement, and not merely that a settlement had been reached. This breached the parties’ agreement to keep the terms confidential. It was not merely a technical breach.

18. We see no reason in the circumstances to exercise our discretion to deprive the applicant company of the remedy that the parties themselves have assessed and agreed to in the settlement: that the union would have to repay the money earlier paid to it. The union signed the settlement. To decline to direct repayment of the \$7500.00 would be to refuse to enforce the agreement.

19. For these reasons, we conclude that the Minutes of Settlement have been breached, and there has been a breach of section 89(7) of the Act. We direct that the union forthwith pay to the company the sum of \$7,500.00.

CONCURRING OPINION OF BOARD MEMBER H. KOBRYN; May 14, 1991

1. Although I'm very uncomfortable with the end results of this decision, I have no choice but to agree with the majority in this case, for the protection of the settlement process.
 2. Once the parties have reached a settlement, set the terms of that settlement in writing, and subsequently all the parties involved have signed this settlement, then all the parties are bound by these signed Minutes of Settlement.
 3. My suggestion to the parties is that before they sign the Minutes of Settlement they should review the terms most carefully and be certain they understand what it is they have agreed to. As in this case, it is apparent there isn't any time limitation on the confidentiality (gag rule) unless time limitations are specifically written into the Minutes of Settlement. In these Minutes there was no such time limitations included. This breach of the "gag rule" took place almost eight months after the settlement but it is still a breach.
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1983-90-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Oston Ltd., Respondent v. Group of Employees, Objectors

Certification - Petition - Document opposing union circulated prior to circulation of petition - Originator of prior document telling employees that document to be delivered to management - Petitioner circulating petition on and within sight of employer's premises, approaching workers during their working hours, punching out early and re-entering plant at night to solicit signatures - Combination of circumstances leaving Board unable to consider petition reliable evidence of true wishes of those signing it - Certificate issuing

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *R. M. Sloan* and *E. G. Theobald*.

APPEARANCES: *L. N. Gottheil*, *Maureen Kirincic*, *Daniel Merriman*, *Paul Castonguay* and *Lisa Kelly* for the applicant; *R. J. Drmaj*, *Trudi Farquhar*, *Antero Laitila* and *Larry Nash* for the respondent; *Carla Adams* and *Richard S. Kouri* for the objectors.

DECISION OF OWEN V. GRAY, VICE-CHAIR, AND BOARD MEMBER E. G. THEOBALD; May 14, 1991

1. This is an application for certification. The applicant is a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act* ("the Act"). The interested parties who attended and participated in the hearings in this matter (the "participants") all agree that the appropriate bargaining unit for the purpose of this application consists of:

all employees of the respondent in Peterborough, save and except supervisors, persons above the rank of supervisor, office and sales staff, engineering staff, customer service staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

2. With one exception, the participants agree on the identities of those employed in the bargaining unit on the application date. Their only dispute is with respect to Ken Forrest: the

applicant says and the respondent and objectors deny, that Mr. Forrest exercised managerial functions within the meaning of clause 1(3)(b) of the Act.

3. November 9, 1990, was the terminal date fixed for this application. That is the date which we determine, pursuant to clause 103(2)(j) of the Act, to be the time as of which membership should be determined for the purpose of section 7 of the Act. As of that time more than 55 percent (roughly 60 percent) of those employed in the bargaining unit had become members of the applicant and roughly half of those had subsequently signed a document ("the petition") expressing opposition to certification of the applicant. These figures would not be affected in any significant way by either of the possible outcomes of the participants' dispute about the status of Mr. Forrest. In these circumstances, under subsection 7(2) of the Act the Board has the power to certify the applicant without a vote, but would ordinarily exercise its discretion to conduct a representation vote if satisfied that the document filed expressing opposition to certification represented a "voluntary" expression of the wishes of those who signed it. The only issue in dispute is whether the petition is "voluntary". The participants presented four days of evidence and argument on that issue.

4. Rick Kouri testified with respect to the origination and circulation of the petition document filed with the Board. Mr. Kouri has been employed by Oston as a shipper for a little over five years. His duties involve arranging for the shipping of products, looking for missing parts and preparing paperwork with respect to orders. In the performance of those duties, Mr. Kouri travels around both the plant and the office, papers in hand occasionally speaking to various employees.

5. Mr. Kouri first heard rumors about the applicant's organizing drive on or about October 25, 1990. No one approached him to solicit his views or support. Notices of this application were posted in the workplace on Friday, November 2, 1990. Mr. Kouri saw them that afternoon. He was upset that there had been no discussion of unionization with him, and no opportunity for him to discuss it with others. He was opposed to the certification of the applicant. He contacted his family lawyer for advice. That lawyer referred him to another lawyer, who asked to see the material which had been posted in the workplace.

6. On the afternoon of November 2nd, Mr. Kouri removed, photocopied and re-posted one set of notices. He then faxed the photocopies to the lawyer he was consulting. He used the photocopy and fax machines located in the employer's office. It is his uncontradicted evidence that his job duties require him to use those machines from time to time, and that no one who might have been present would have been aware that he was using those machines for any other purpose. Before calling the lawyer, the only person with whom he had any discussion about the union's application was Bert Dickson, about whom more will be said later. The conversation was to the effect that Mr. Kouri planned to do something about the application and would be obtaining legal advice in that connection.

7. After receiving the materials Mr. Kouri had faxed, the lawyer he consulted gave him some wording for the petition. Mr. Kouri made some modifications to that wording to remove an implication that anyone who was signing had earlier signed the union card. Mr. Kouri also prepared a memo outlining his views on the union's application and soliciting support for his opposition to it. He went to his sister's house on Saturday, November 3, 1990. She typed up the petition and memorandum on her home computer and printed them out on her printer. Mr. Kouri left the mechanics of this entirely up to his sister. He was challenged in cross-examination on the fact that the two documents appear to have different typefaces. Mr. Kouri insists that both documents came from the same printer. That is not improbable. The typefaces in the memorandum and petition

could easily be the letter quality and draft quality typefaces, respectively, of the same dot-matrix printer.

8. Mr. Kouri testified that he may have had another telephone conversation with Bert Dickson that weekend, but did not otherwise communicate with anyone concerning his plan to oppose the union's application.

9. Mr. Kouri went to work early on Monday, November 5th. He is one of a very few non-managerial employees who have the security access code to get into the plant when it is closed. He used that code, entered the plant and used the employer's photocopy machine to make copies of the materials his sister had prepared. There was no one else present at the time that he did this. He then left the plant and stationed himself at the entrance to the employee parking lot where, for twenty-five to thirty minutes, he handed copies of his memo to those employees willing to receive it as they arrived for work. Mr. Kouri's memorandum read as follows:

TO: Employees Opposed to CAW - CANADA

FROM: Rick Kouri - Shipping/Receiving

DATE November 5, 1990

**SUBJECT: CAW - CANADA
OPPOSITION AND THE COSTS INCURRED**

The right to enforce unionization and joining CAW - CANADA is granted on the basis of support by the majority of employees. Because of its significance to all employees and the future of Oston Ltd., I personally feel that there must be some real assurance that the wish of the majority has in fact been obtained. **All employees must be informed of their rights and the impact that a union will have on our operations.** CAW - CANADA is a nation-wide business. If we become members, we will be required to contribute union dues from our pay in order to support their business. There is also a great risk of conflict between labour and management that is present in CAW-CANADA's collective bargaining process. This may negatively impact our operation in Canada which is already volatile to the current economic recession and Free Trade.

Reversing the initial petition to join CAW - CANADA may be worth our while until all employees completely understand the implications of unionization.

It is very important for all employees to realize that Oston Ltd. is restricted from discouraging or preventing its employees from joining the CAW - CANADA. Therefore, preventing unionization and the costs incurred are the responsibility of those employees who sign the petition against joining CAW - CANADA.

This is a legal matter. To reverse the initial petition to join the CAW - CANADA, a lawyer must be consulted on every detail to stop the union drive. There will be some incidental expenses; however, we can stop the union drive at a minimal expense if we split the bill and everyone pays their share.

I will be pleased to answer any questions that you may have regarding this matter.

If you are against joining CAW - CANADA at the present time, please sign the petition expressing your opposition.

10. Having handed out this memo, Mr. Kouri went in to work at the usual time. During the morning he told some employees that he would take his petition to the employee parking lot during the lunch hour, where employees could meet him and sign it. He and Bert Dickson went to the parking lot during the lunch hour. Six employees (including several to whom Mr. Kouri had not

spoken during the morning) came out to the parking lot and signed the petition. Their signatures were witnessed by Mr. Dickson.

11. Mr. Kouri punched out a few minutes before his regular quitting time that Monday afternoon so that he could go to the parking lot to solicit more signatures as employees left for the day. He obtained three more signatures in that way, then went back into the plant for another half hour. During that half hour he spoke to at least two afternoon shift workers and told them that he would return at 9:00 p.m. (the afternoon shift's lunch break) to get signatures on his petition. In the course of his testimony he gave two different explanations for his re-entering the plant that afternoon. The first explanation he offered was that he had forgotten his lunch pail and had re-entered the plant to get it. The explanation he gave later in his testimony was that he returned to the plant to follow up or check on some work related matter. His punch card shows that he punched in when he re-entered the plant and punched out when he left again. The time he spent after his re-entry was sufficient to compensate for his early first departure, so that he did not lose any pay for the day.

12. Mr. Kouri returned to the plant that Monday evening, as he had earlier told the afternoon shift workers he would. When he arrived that evening it was raining. Rather than wait in the parking lot, he entered the building. He found one employee eating lunch at his work station, and obtained that employee's signature there. He then went to the cafeteria, where he found eleven other employees who were all willing to and did then sign the petition. He testified that there would only have been one supervisory or managerial person on the premises at the time. He did not see that person at any time during this evening visit, nor did he seek or obtain that person's permission to enter the plant at that time. Upon leaving the cafeteria, he ran into two other employees on his way out of the plant and obtained their signatures.

13. On Tuesday, November 6th, Mr. Kouri brought the petition with him to work. He learned of another employee's interest in signing, and obtained that employee's signature during the noon lunch break at the employee's work station where he was just finishing his lunch. Shortly after Mr. Kouri's quitting time that Tuesday afternoon one employee came and signed the petition in the shipping office. Moments later, three more signed it just outside of the shipping office. Mr. Kouri testified that no one member of management was in sight at this time. The evidence does establish that two members of management occupy offices on the second floor of a structure in the center of the plant, from which they can see activity outside the shipping office if they get up from their desks and go over to a window which faced in that direction.

14. After obtaining these four signatures and signing the document himself, Mr. Kouri walked out of the plant. He then walked back in because, he testified, he had forgotten his lunch pail. He obtained two more signatures during this period. At one point in his testimony he said one signature was obtained while he was on the way out and the other as he came back in. At another point in his testimony he said both signatures were obtained on his way back in. In either event, the two signatures were obtained on the employer's premises during the signatories' working hours.

15. Mr. Kouri discussed the petition with several employees during his working day on Wednesday, November 7, 1991, but obtained no further signatures until after his quitting time. At that point, six employees entered the shipping office one at a time, signed the petition and then left. This all occurred in the course of five minutes or less. Mr. Kouri obtained the last petition signature on Thursday, November 8th after work. On Friday, November 9th Mr. Kouri called in sick, and used the resulting time off to file the petition with the Board.

16. This application was the subject of an initial meeting with one of the Board's Labour

Relations Officers on November 23, 1990. Mr. Kouri retained counsel to represent him shortly thereafter. On November 26th and again on November 27th, Mr. Kouri punched out, left work and went home in order to retain and instruct counsel by telephone. The employer did not pay Mr. Kouri for the time he was away, but did not otherwise respond to his absence. With respect to these and other instances when he seemed to have been free to do as he wished in advancing his opposition to the union's application, he testified in a credible way that the employer generally gave him some freedom to come and go to deal with personal business without having to identify the nature of that personal business, so long as worked the requisite number of hours and he got his job done. He said that he had not discussed his opposition to the union's application with his immediate supervisor or any other member of management on any occasion, either in connection with his absences or intended absences from work or in any other context.

17. The applicant called two witnesses: Paul Castonguay and Mark O'Brien. Both testified with respect to the circulation earlier, on October 31, 1990, of another document expressing opposition to representation by the applicant.

18. Mr. O'Brien was working the afternoon shift on October 31st. He arrived early and entered into a conversation with some day shift workers who asked him to obtain the signatures of the afternoon shift workers on the document they had prepared and circulated earlier among the day shift workers. As Mr. O'Brien recalls, this was a handwritten document which said "I do not support the CAW", or words to that effect. These employees told Mr. O'Brien that they had decided to circulate this document after hearing Bert Dickson say that he thought the employer would close the plant if the union came in. They said they planned to present the document to "Andy" after it had been circulated and signed by as many employees as possible. Andy is the most senior member of management at the plant. Mr. O'Brien testified that these persons to whom he spoke seemed to have believed Bert Dickson's prediction. Mr. O'Brien said he did not believe it. He nevertheless agreed to circulate the document. He went to Ron Saunders, his supervisor on the afternoon shift, and told him he would be going around getting names on this document before he commenced work. He said Mr. Saunders told him "all right, but hurry up." Mr. Saunders was not called to contradict this evidence.

19. Mr. O'Brien says he spent 30 to 40 minutes on the evening of October 31st going from employee to employee at their work stations, soliciting their signatures on this earlier document. He says he pointed out to employees that nearly all of the day shift that signed the document and that the first two signatures on it were those of the two individuals who had originally brought the union in. He told employees that the plan was to deliver the document to Andy and that he thought members of the afternoon shift ought to sign it so that the employer would not think that they had been responsible for bringing the union in. Mr. Castonguay was one of the employees approached by Mr. O'Brien. His testimony as to what Mr. O'Brien said to him was consistent with Mr. O'Brien's.

20. After he finished getting signatures on the document, Mr. O'Brien gave it to someone else who was to return it to the day shift employees who had been circulating it. Mr. O'Brien said that he did not know what had ultimately happened to the document. He said that he had heard from unidentified sources that Mr. Kouri was doing another petition because the first petition had not been done right. His understanding was that it was the wording of the first petition that was not right. He said that he did not know whether Mr. Kouri knew of the first petition. He knew that the document circulated by Mr. Kouri was Mr. Kouri's. Having been involved in circulating the first petition, he knew Mr. Kouri's document was not connected with it.

21. Mr. Castonguay testified that, having been approached by Mr. O'Brien to sign a peti-

tion, he was surprised when he learned on November 5th that Mr. Kouri was circulating a petition. He asked an unidentified fellow worker what had happened to the first petition. This worker told him that the first petition was "not worth shit." Mr. Castonguay said there was a "general feeling" that Bert Dickson and Ken Laundry were reporting to management the names of people who signed Mr. Kouri's petition. As far as Mr. Castonguay knew, the basis of this belief was that the these two gentlemen had management aspirations and regularly ate lunch with members of management.

22. Mr. Castonguay was working on the day shift in the week of November 5th. On Tuesday or Wednesday, as he was going to punch out, Rick Kouri asked him if he wished to sign the petition. They were in an aisle near the punch clock. Mr. Castonguay said he was conscious at that point of the presence of Mr. Laundry and Mr. Dickson. He was also conscious of the proximity of a foreman's office then located nearby, from which he and Mr. Kouri could be seen. He did not sign the petition, however.

23. There is no evidence that the employer was in any way involved in the origination or circulation of Mr. Kouri's petition. That is not the end of the enquiry, though. When we enquire into the "voluntariness" of a petition, we are concerned with whether the document is reliable evidence of the true wishes of the employees who signed it, particularly those employees on whose membership the applicant relies. Generally speaking, employees do not expect their employers to be happy about having to deal with a union or with the employees who bring the union in. No-one could seriously imagine that a show-of-hands vote conducted in the presence of their employer would be reliable evidence of the true wishes of employees with respect to union representation. A petition which employees expect to be seen by their employer suffers from the same defect. As a result, the Board must consider whether, in all the circumstances, the employees who were asked to and did sign Mr. Kouri's petition would have had a reasonable concern that their employer would find out who signed and who did not.

24. The applicant points to a number of circumstances which might have contributed to a belief that the employer was connected with Mr. Kouri's petition and might thereby become aware of who did and did not sign it. But for the evidence with respect to the circulation of the earlier document, we might not have found the other circumstances sufficient to induce that belief. That evidence tipped the scales.

25. Quite a bit was said in argument about whether the first document should be regarded as a petition and the evidence about it evaluated in accordance with the Board's standards for evidence about petitions. The effect which might have been given to the first document is not the issue, however. We adopt here the following observations from *Fram Canada Inc.*, [1989] OLRB Rep. Feb. 133:

5. We have no difficulty at all with the abstract proposition that the circumstances surrounding the prior circulation of a document opposing trade union representation are relevant to the Board's assessment of the "voluntariness" of a different and subsequent document filed with the Board in connection with a certification or termination proceeding. That is not to say that the "voluntariness" of signatures on the earlier document becomes a relevant question. The voluntariness of the document filed with the Board and relied upon by the objectors is still the issue. The circumstances surrounding the earlier document are relevant only to the extent they bear on the question whether the subsequent document is reliable evidence of the true wishes of those who signed it. It is unnecessary to elaborate all the sorts of situations in which that relevance might arise. To take but one generic example, the circumstances surrounding the circulation of the earlier document might have been such as to raise in the minds of employees a reasonable perception (whether true or not) that management was somehow involved in the exercise and would learn from those circulating it the identities of those who did or did not sign it. A similar perception might then arise with respect to a subsequent document filed with the

Board if those who had circulated the earlier document were responsible for circulating the document put before the Board.

16. It is not enough, however, to shift the focus of attention to an earlier document, find that it would not have been treated as reliable evidence of the wishes of those who signed it and then, by reason of some connection between the two documents, pronounce the one before the Board to be “tainted” or “infected” with the infirmities of the earlier one. The use of these words, with their connotations of disease and decay, carries with it the danger that they will become substitutes for thought. The question is not simply whether there is a connection to an earlier document with an infirmity but, rather, whether the nature of the infirmity and the nature of the connection support a conclusion that the document filed and relied upon by the objectors is not itself reliable evidence of the wishes of those who signed it.

17. Even the most cursory study of the Board’s jurisprudence would reveal that there are a wide variety of circumstances which may engender in employees an objectively reasonable (even if false) perception of management involvement in the origination and circulation of a statement in opposition to trade union representation, with the result that that statement is not given weight by the Board in assessing employee wishes. This can result even from behaviour of persons other than the employees who brought the document into existence and solicited the signatures on it, behaviour over which those employees had no control at all. Even so, evidence with respect to such behaviour weighs in the balance in determining whether, on a balance of probabilities a petition represents a voluntary expression of the wishes of those who signed it.

The fact and manner of the prior circulation of the first document form part of the context in which Mr. Kouri’s petition was circulated and, hence, part of the circumstances we must consider in assessing the perception employees were likely to have of Mr. Kouri’s petition.

26. Mr. O’Brien gave first hand evidence of his circulation among afternoon shift workers of a document which expressed opposition to representation by the union. He did this on the employer’s premises during his working hours and those of the persons who signed, without interference by their supervisor. He told everyone he approached that he had the supervisor’s permission to circulate the document, that the plan was to present the signed document to the employer and that they should sign to “cover their ass” with the employer.

27. Mr. O’Brien testified that the document he circulated appeared to bear the signatures of day shift workers. He was not present when those signatures were obtained, and cannot say what those workers were told when asked to sign. On that subject, he could only repeat what he was told by others who were not called to testify. We are mindful of the danger of treating such hearsay declarations as evidence of the truth of their contents. Even if no day shift worker (other than the two who recruited Mr. O’Brien) knew at first of a plan to present the first document to “Andy”, however, day shift workers would surely have learned of Mr. O’Brien’s statements to afternoon shift workers within a day or two after they were made that is, before Mr. Kouri began circulating his document.

28. Mr. O’Brien’s actions on October 31st formed part of the context in which Mr. Kouri circulated his document on and after November 5th. By then most employees would have been aware that a document similarly expressing opposition to representation by the applicant had been circulated a few days before, and that the intent on that occasion had been to show the document to the employer after it had been signed. It seems most unlikely that, as he testified, Mr. Kouri never learned of the earlier document from anyone in the course of circulating his own. Whether he knew of it or not he did nothing to disassociate his efforts and intentions from the efforts made and intentions expressed in connection with the earlier document. In the absence of any such attempt to disassociate, employees less knowledgeable than Mr. O’Brien might very well have supposed that Mr. Kouri’s efforts were an outgrowth or continuation of the earlier efforts taken with the same intention to present the results to management.

29. Mr. Kouri circulated his document on and within sight of the employer's premises where his activities might be seen by management, approached workers during their working hours, punched out early and re-entered the plant at night to solicit signatures, all without hindrance by management. We do not accept the argument that this action amounts to actual employer involvement in or support of the petition. Nevertheless, in the context created by Mr. O'Brien's earlier actions and the absence of any attempt by Mr. Kouri to disassociate himself from those actions, these features of Mr. Kouri's behaviour were much more likely than they might otherwise have been to create the impression that Mr. Kouri was acting with the approval and support of the employer and could be expected to communicate the results of his endeavours to it. Indeed, we find that this combination of circumstances was sufficiently likely to create that impression that we do not consider the document filed by Mr. Kouri to be reliable evidence of the true wishes of those who signed it. We should say that in coming to that conclusion we have not relied on the evidence of Mr. Castonguay concerning the alleged "general feeling" that Bert Dickson would report to management on the signing of the petition.

30. Accordingly, we are not persuaded to exercise our discretion under subsection 7(2) of the Act by directing that a representation vote be conducted. In coming to an opposite conclusion, our colleague takes a view of the evidence which none of the parties invited the Board to take. The respondent and objecting employees were represented by competent counsel. Neither counsel at any time suggested that the document circulation in which Mr. O'Brien played a part was a charade which had as its real purpose the anticipatory sabotage of any subsequent legitimate efforts at gathering evidence of employee opposition. As a result, the applicant had no notice that it would have to answer such a charge. It is not surprising that it did not do so. Having regard to general principles of natural justice, section 8 of the *Statutory Powers Procedure Act* and section 72 of the Board's Rules of Procedure, it would be quite improper for us to make a finding of misconduct that was never alleged and to rely in doing so on a party's having failed to call witnesses in answer to a charge never made. We would have left assessment of the proper response to subterfuge of the type now alleged by our colleague to a case in which the issue was properly before the Board.

31. The dispute about Mr. Forrest's employee status is not one which has to be decided in order to dispose of this certification application. If his status continues to be in dispute hereafter, that may be the subject of an application for determination under subsection 106(2) of the Act.

32. A certificate shall issue to the applicant with respect to the bargaining unit described in paragraph 1.

DECISION OF BOARD MEMBER R. M. SLOAN; May 14, 1991

PREAMBLE

1. With respect I strongly dissent from the majority decision.

2. I can agree with the conclusion drawn by the majority in paragraph 24 which states in effect that, but for "...the circulation of the other document" Mr. Kouri's petition would be accepted as voluntary and a representation vote would be ordered by the Board.

3. However, we then very quickly part company with respect to the significance that should be given to what shall henceforth be referred to in this dissent as the "document", and *this dissent records the interpretation that I place upon the testimony and documentary evidence adduced before the Board.*

THE "DOCUMENT"

4. The "document" was not entered into evidence by the applicant nor did the applicant call as witnesses the two originators of "the document", even though it is relying totally upon the "document" to discredit the legitimate "statement of desire" (petition). The failure is significant in view of the unsatisfactory testimony of Mark O'Brien upon whom the applicant relied to inform the Board of the "document's" origin and subsequent mysterious "disappearance".

5. First I wish to note that Mr. O'Brien, in my view, was not the reluctant witness that the applicant attempted to make him out to be, or that he presented himself to be - the Board is expected to believe that he was "forced" to come before the Board under subpoena by the union while his demeanour, the manner in which he gave his testimony and his involvement in the circulation of the "document", suggest otherwise.

6. Mark O'Brien testified that the "document" originated, significantly in my view, with the two union supporters *who invited the union into the plant* to attempt to organize the appropriate group of employees.

Incredibly, the Board is being asked to believe that on the basis of a remark made by a fellow employee - a person who by no stretch of the imagination was, or could have been, considered a member of Oston's supervisory or managerial staff - these two strong union supporters panicked and circulated the "document" in an attempt to discount the union membership evidence thus far collected and kill the union's organizing drive.

7. We heard from Mr. O'Brien that he was not clear as to exactly what the language was in the heading or text of the "document" other than that it was handwritten and included words along the lines of - "I do not support the CAW".

It is my belief that the Board, in not knowing exactly what language the "document" did contain, cannot fully assess the reasons why those employees who did sign it were persuaded to do so. Which of course is another compelling reason to ignore the suspect "document".

8. On the basis of the evidence adduced I have no hesitation whatsoever in branding the "document" as a fraud, a product of a deliberate course of action produced and staged to destroy the validity of any legitimate statement of desire (petition) that other employees might wish, as a matter of right, to present to the Board.

9. Is the applicant seriously asking the Board to accept as valid evidence the mysterious "document" which is purported to be legitimately in opposition to the union, when:

- (a) The originators were, and we can correctly assume still are, strong union supporters;
- (b) The "document" was prepared, or so we are led to believe, on the pretext that its originators having allegedly been told by Bert Dickson that if the union was certified the plant would close. Why didn't the applicant call or subpoena Bert Dickson to testify as to the source of his information or concern - he is after all an employee in the bargaining unit agreed to by the respondent and the applicant?
- (c) The origination, circulation, and custody of the "document" is so fraught with Machiavellian overtones that the applicant, in my view,

brings discredit to itself by presenting the "document" as a serious matter for the Board's consideration.

10. Let's follow the "document" through from its inception:

- (a) Prior to the posting of the Board's Form 6 (the "green sheets") advising the employees of the union's application for certification - and significantly, before the employees are advised through the "green sheets" of the manner in which they may formally express opposition to the union - the "document" is prepared, ostensibly to nullify the union's membership documents already signed.
- (b) The originators then proceed to taint this "document" so thoroughly and so successfully that it could not possibly have been through inadvertence - they knew exactly what they were up to.
- (c) How they dealt with the "document" on the day shift we do not know, but we did hear from Mark O'Brien that he was asked to obtain signatures from afternoon shift employees and incredibly, he was to follow detailed instructions that would most effectively destroy the validity of the "document" whose sole purpose, we are asked to believe, was to be an instrument designed to "rescue" them from union certification.

11. Mr. O'Brien was given very specific instructions and from his testimony we learned that he followed these instructions to the letter.

- (a) He told his foreman that he was going to be away from his work station to collect signatures on a petition against the union. Mr. O'Brien killed two birds with one stone here - he created the perception of company involvement through the approval, however tacit, that he received from his foreman, and he collected the signatures in an open manner during working hours where his activities could be seen by his foreman and any other management personnel, reinforcing the perception claimed by the applicant that the "document" was blessed with management approval.
- (b) He told the prospective signatories that he had obtained the approval of his foreman - which would of course be tantamount to the "document" receiving company support in the minds of the employees.
- (c) He told the prospective signatories that it was okay to sign the document even if they supported the union - and to point out to employees that the first two names on the "document" were those of the two employees who had originated the union organizing drive within the plant.
- (d) He told the employees that they had better sign the "document" to cover their asses, as the "document" would, once the signatures had been obtained, be turned over to "Andy" (referring to Antero Lai-tila, the company President).

12. As the circumstances outlined in paragraph 12 are not in dispute can there then be any doubt whatsoever that the "document" was deliberately conceived and contrived to prevent objecting employees from exercising their rights under the Ontario *Labour Relations Act*.

13. In paragraph 25 of the majority decision reference is made to the *Fram Canada Inc* file. In my view the Fram decision supports the arguments for finding that the petition was indeed voluntary. The Board in that decision found that the second document (petition) was a voluntary expression of employees' wishes, even though the first document was found to be flawed and had been originated and circulated by the very same group of people.

In the case before this panel those persons involved with the "document" and those persons involved with the petition were completely different and it would be unfair to reject the honest petition because of the irregularities associated with the flawed "document". The circumstances relating to the "document's" origination, circulation and disposition are so bizarre as to require the Board to ignore the "document" and any subsequent effect it may or may not have had with respect to the legitimate petition.

14. Given that the "document" was, in my view, a deliberate attempt to "poison the well" with respect to the subsequent legitimate statement of desire and thus constitutes a violation of the protected rights of employees to choose to be represented or not by a trade union, I would dismiss the application.

To hold otherwise would be to reward the applicant and its supporters by granting certification as my colleagues have done, thereby denying to those employees who made an honest submission to the Board, their legal right to join or not to join a trade union of their choice.

15. In support of my view, (indeed the view of the majority but for the offending document) that the petition is the result of a free and voluntary expression and has the backing of a majority of the employees in the proposed bargaining unit I wish to note the following:

- (a) There are thirty-eight (38) signatures on the legitimate petition, representing 58% of the sixty-five (65) employees on the list of those employees in the agreed to bargaining unit description.
- (b) It follows then that twenty-seven (27) employees (42%) did not sign the legitimate petition - for whatever reason - but they obviously did not feel compelled to sign the petition in spite of the testimony we heard that the "document" would find its way into management's hands. This information, on its own, indicates that even if a few employees were influenced in a negative way by the "document", the number is not significant enough to warrant the rejection of the legitimate petition.
- (c) Of greater significance is the fact that of the twenty (20) employees who signed membership cards and also signed the legitimate petition only one (1) of those employees signed a revocation document re-affirming membership in the union.
- (d) The purpose in dealing with these numbers in some detail is to put into proper perspective the extent of the true wishes of the employees. In *Imperial Clevite Canada Inc.*, [1987] OLRB Rep. March 375,

at paragraph 2 (32), a reference quotes from *Peel Block Co. Ltd.*, 63 CLLC para. 16,227 which states that:

...The Board's function therefore, is still to "protect the fundamental rights of employees to make their own choice...on the matter of selecting or rejecting a bargaining agent."...

16. To repeat, I would dismiss the application for certification because whether or not the union knew what their in-plant supporters were up to, it was the union through their counsel who raised the issue of the "document" before the Board and urged the Board to reject the legitimate petition on the basis of taint.

17. It is ironic that the "document" which, if we are to believe its originators, was designed to prevent certification, actually assures certification by so tainting the legitimate petition, in the minds of my colleagues at least, that the union is being certified without the vote which should have resulted from the unanimous finding of the Board, *that but for the "document" a vote would have been ordered.*

I fail to comprehend how the "document" which according to the testimony of Mr. O'Brien was considered by its originators to be "not worth shit" can in fact be determinative in rejecting the legitimate petition.

18. In paragraph 30 of the majority decision I am taken to task for allegedly ignoring "general principles of natural justice" by allegedly "charging" the applicant with certain irregularities that were not raised by the competent counsel of the respondent and the objecting employees.

The Board was urged by counsel for both the respondent and the objecting employees to reject the "document" on a number of grounds.

The fact that one of those grounds was not the "poisoning of the well" issue is immaterial.

It is worth noting here that employers run considerable risk in entering the petition arena - a risk that could in fact result in the rejection of an otherwise voluntary petition should the Board decide that the employer's views show too close an alliance with those of the petitioner(s).

19. Board decisions are not made solely on the basis of charges laid by the various parties, the ultimate outcome of the Board's deliberations depend upon the quality and substance of the evidence adduced.

For example, where a respondent is not privy to defective membership evidence the Board may reject such evidence without charges having been made by the respondent.

Similarly, as in this case, the Board has the responsibility and obligation to consider all of the evidence adduced and to arrive at a conclusion.

In this case I concluded that the preponderance of evidence points in one direction and I have formed my opinion on the basis of such evidence, rejecting the view held by the majority with respect to the matter of no "charges" having been made.

20. Failing the outright dismissal of the application for certification, I believe that the simple and just alternative to such dismissal - under the peculiar circumstances of this case - would be to order that a representation vote be held to provide *all* employees with the opportunity to express by secret ballot their true wishes with respect to union representation.

21. Even if it is assumed that the "document's" failings are the result of inadvertence it should still be rejected on the basis of the same arguments detailed above in this dissent with regard to it being a flawed document.

22. There is no question in my mind that under the circumstances of this case the application for certification warrants outright dismissal. Failing that, I believe that the ends of justice would be served by the ordering of a representation vote.

3247-89-R; 3305-89-R The Carleton Roman Catholic Separate School Board Employees' Association, Applicant v. **The Ottawa-Carleton French Language School Board** (Full Board), The Ottawa-Carleton French Language School Board (Catholic Sector), and The Ottawa-Carleton French Language School Board (Public Sector), Respondent v. Service and Commercial Employees Union, Local 272, Intervener; Ottawa Board of Education Employees' Union ("OBEEU"), Applicant v. The Ottawa-Carleton French Language School Board (Full Board), The Ottawa-Carleton French Language School Board (Catholic Sector), and The Ottawa-Carleton French Language School Board (Public Sector), Respondent v. Service & Commercial Employees Union, Local 272, Intervener

Employer Support - Representation Vote - Board previously ordering vote between Association and Local 272 - Local 272 asking Board not to give effect to results of representation vote - Local 272 alleging improper employer support to Association or, alternatively, that Association created and exploited perception of such support - Board finding no basis for allegations of employer support or improper electioneering - Board dismissed Local 272's request

BEFORE: *Bram Herlich*, Vice-Chair and Board Members *W. A. Correll* and *H. Peacock*.

APPEARANCES: *Christopher E. Clermont* and *Gerard Poirier* for the applicant in Board File 3247-89-R; *Graham Clarke* and *Robert Lefebvre* for the respondent; *Donald Moore*, *Roger Lortie*, *Alick Ryder* and *Bruno Gagnon* for the intervener; no one appearing for the applicant in Board File 3305-89-R.

DECISION OF THE BOARD; May 29, 1991

1. In a decision dated April 23, 1991 we dismissed the request by Service and Commercial Employees Union, Local 272 (hereinafter referred to as "Local 272") that the Board not give effect to the results of the representation vote between Local 272 and The Carleton Roman Catholic Separate School Board Employees' Association (hereinafter referred to as the "Association") held pursuant to the decision of the Board (differently constituted) dated October 29, 1990 in this matter. These are the reasons for our decision dismissing Local 272's request.

2. The Ottawa-Carleton French Language School Board (hereinafter referred to as the "French-Language School Board" or the "FLSB") was created by the terms of the *Ottawa-Carleton French-Language School Board Act*, 1988. Pursuant to the legislation, employees of four regional school boards were transferred to the French-Language School Board. Those

employees formerly worked in a number of different bargaining units with the four regional boards while some were not represented by any bargaining agent. Under the terms of the legislation and pursuant to section 63 of the *Labour Relations Act* a number of applications were filed to determine bargaining rights with respect to various bargaining units of transferred employees who are not teachers. It should also be noted that the French-Language School Board has a public sector and a Roman Catholic sector. Thus the Full Board, the Catholic Sector and the Public Sector each have different jurisdiction with respect to different matters, including collective bargaining.

3. Through a series of Board decisions bargaining rights have been clarified. Six different bargaining units are involved. In a decision dated October 24, 1990 and pursuant to the agreement of the parties, the Board (differently constituted, hereinafter the "O'Neil panel") declared that the Association was the bargaining agent for office and clerical employees of the Full Board, that the Canadian Union of Public Employees ("CUPE") was the bargaining agent for office and clerical employees of the Public Sector and directed a representation vote between CUPE and the Association to determine the bargaining agent for office and clerical employees of the Catholic Sector.

4. By decision dated October 29, 1990 and having regard to the agreement of the parties, the O'Neil panel directed that the following representation votes be held:

- (a) a vote between the Association, Local 272 and the Ottawa Board of Education Employees' Union ("OBEEU") with respect to maintenance employees of the Full Board;
- (b) a vote between Local 272 and the OBEEU with respect to cafeteria employees of the Public Sector; and
- (c) a vote between the Association and Local 272 with respect to bus drivers employed by the Catholic Sector.

5. By decision dated March 1, 1991 the O'Neil panel gave effect to the results of three of the four previously directed representation votes and declared that:

- (a) the Association is the exclusive bargaining agent with respect to office and clerical employees of the Catholic Sector;
- (b) the OBEEU is the exclusive bargaining agent for cafeteria employees of the Public Sector; and
- (c) the Association is the exclusive bargaining agent for bus drivers in the Catholic Sector.

(Complete bargaining unit descriptions can be found in the decisions referred to.)

6. Thus, with the exception of the unit of maintenance employees of the Full Board, which is the subject of the present decision, bargaining rights have been clarified. In the maintenance unit, as already indicated, a representation vote was directed between three competing unions. When that vote failed to disclose a clear majority a second vote was directed between the Association and Local 272. That vote was held on January 17, 1991 and more than fifty percent of the ballots cast were cast in favour of the Association. In the normal course the Board would therefore have declared the Association to be the exclusive bargaining agent. However, in view of the allegations filed by Local 272, the matter was set down for hearing.

7. Essentially, Local 272 argues that the employer has provided improper support to the

Association in the election campaign between the two unions. Alternatively, even if there was no actual employer support, the Association has created and exploited the perception of such support. In either case the Board ought not to give effect to the results of the vote. The locus of this alleged (perceived) support is the settlement, on the very day of the representation vote, of a section 89 complaint previously filed by the Association. Local 272 also impugns the contents of a leaflet (which refers to the section 89 complaint) distributed by the Association on the eve of the representation vote.

8. The present applications were filed in March of 1990 and two other related applications (Board files 2908-89-R and 2909-89-R) were filed in February of the same year. In May of 1990 (i.e. prior to any of the section 63 applications having been determined or even heard) the Association filed a section 89 complaint (Board file 0465-90-U) against the French-Language School Board. The material portions of that complaint read as follows:

... the respondent created a system of financial remuneration for non-union employees such that they were paid more than union employees for work of equal value, thereby interfering with the representation of employees by a trade union, contrary to section 64 of the Act, and sought to intimidate and coerce union employees to cease to be members of their union, contrary to section 70 of the Act. All this was done through making it more financially rewarding to cease to be a union employee.

9. The complaint was filed on behalf of the Association and Gerry Poirier, its president. Mr. Poirier signed the complaint and gave evidence in the present proceedings regarding the complaint and its ultimate resolution. Sometime prior to filing the complaint, Mr. Poirier discovered that the FLSB had implemented a new salary grid in respect of its non-unionized employees. Mr. Poirier had been provided a copy of the grid by the FLSB. Although Local 272 suggested there was some impropriety in the provision of this information to the Association, we are satisfied that, whether or not Local 272 actually had a copy of the salary grid or was aware of the specific figures, there is no dispute that it knew such a salary grid was in place and that some non-unionized employees were consequently being paid at levels higher than their unionized counterparts. In any event, Local 272 was provided with notice of the complaint and hearing scheduled in that matter. It chose not to participate.

10. It should be recalled that at the time the complaint was filed, as a result of the creation of the FLSB, the transfer of employees from the four regional boards and the pending section 63 applications, there were employees in identical classifications receiving different levels of remuneration depending on whether they were represented by a bargaining agent in their former employment with a regional board and, if so, which bargaining agent. Mr. Poirier testified that his intention in filing the complaint was to do so on behalf of all his members employed by the FLSB. At the time the complaint was filed that would have included, inter alia, employees in the bargaining unit which is the subject of the present decision.

11. For various reasons, not material to our considerations, the section 89 complaint did not actually come on for hearing until January 17, 1991. By this time the collective bargaining landscape had altered considerably. As indicated above, by this point in time the Association had secured bargaining rights for the office and clerical employees of the Full Board and had been victorious in representation votes regarding the office and clerical employees of the Catholic Sector and bus drivers also in the Catholic Sector. Although the Board had not yet made a formal declaration with respect to bargaining rights in the latter two units, no party had filed any objection to the vote or otherwise suggested that the results of the vote should not be implemented.

12. After several hours of negotiations on January 17, the parties to the section 89 complaint executed two letters of agreement resolving the complaint. Those letters were incorporated

into the decision of the Board (differently constituted) which issued on February 8, 1991. The first of the letters reads as follows:

LETTER OF AGREEMENT

BETWEEN:

THE CARLETON ROMAN CATHOLIC SEPARATE SCHOOL BOARD EMPLOYEES' ASSOCIATION (CRCSSBEA)

- AND -

THE ROMAN CATHOLIC SECTOR OF THE FRENCH LANGUAGE SCHOOL BOARD OF OTTAWA-CARLETON

WHEREAS the Parties agree to settle this complaint filed before the Ontario Labour Relations Board bearing File No. 0465-90-U, the Parties agree that:

1. The Superintendent of Human Resources will present the attached CRCSSBEA request and will make a recommendation that the Job Evaluation Plan concerning internal equity and pay equity be put in force for all of the office, secretarial and technical workers and bus drivers employed by the Roman Catholic Sector of the French Language School Board of Ottawa-Carleton according to the method of implementation approved for non-affiliated employees as adopted on February 26, 1990 by the Roman Catholic Sector.
2. The Ontario Labour Relations Board will issue a declaration to the effect that there was neither anti-union animus nor an unfair labour practice committed by the Roman Catholic Sector against the CRCSSBEA as had been alleged in File No. 0465-90-U.
3. The Superintendent of Human Resources will have a reasonable delay to complete the necessary research for his presentation and will make his best efforts to submit his report and recommendations at the meeting of the Human Resources Committee on February 13, 1991. If there is a delay, the CRCSSBEA will be informed and the reasons for the delay will be provided.
4. The request and recommendation previously mentioned in paragraph 1 includes the salary adjustments required to give effect to the resolution adopted in 1990 concerning the economic increases accorded to non-affiliated employees of the Roman Catholic Sector.
5. The Job Evaluation Plan, the method of implementation of this plan as well as the economic increases accorded for the year 1990 will not be an issue in the negotiations that will start in 1991.
6. Subject to the approval of the present agreement by the Roman Catholic sector, the CRCSSBEA accepts that the Job Evaluation Plan satisfies the demands of the *Pay Equity Act, 1987*.

(signature of
Gérard Poirer)
for the CRCSSBEA

(signature of
Robert Lefebvre)
for the Roman
Catholic Sector of
FLSBO-C

This is a formal request by the CRCSSBEA, on behalf of its members that the OCFLSB raise and remunerate the members of the EA in accordance with the non-affiliated salary grid contained in the Charette, Fortier, Hawley/Touche Ross Pay Equity/Job Evaluation Report presented to the School Board [Full Board] in November 1989 and as adopted by the [Full board] by Resolution dated [March 6, 1990]*. The EA further requests that this salary grid apply to all

EA members retroactively to September 1, 1989, the date the salary grid became operative for all non-affiliated employees. The EA also requests the same salary adjustment for their members for 1990 as was accorded the non-unionized employees of the Board for the same year.

* Information inside square brackets added for clarification purposes.

13. The second letter of agreement refers to the Full Board in lieu of the Catholic Sector and to office and clerical employees only rather than the bargaining units contemplated in paragraph 1 of the letter reproduced above. In all other respects the terms of the two documents are identical.

14. At least one of Local 272's witnesses expressed the opinion that the settlement applied to maintenance employees. Mr. Poirier's evidence is to the contrary. Although originally filed on behalf of all the Association's members (which, at the time of filing would have included some maintenance employees), the terms of the settlement were limited to bargaining units for which the Association (in the eight months following the filing) had secured exclusive bargaining rights. The terms of the settlement are consistent with Mr. Poirier's evidence - they are limited to office and clerical employees of the Full Board and of the Catholic Sector and to bus drivers in the Catholic Sector. The settlement, whatever its propaganda value in the election campaign, makes no mention of the maintenance employees. Thus it has no direct or immediate effect on the bargaining unit we are currently concerned with.

15. Neither is there any evidence before the Board which would lead to the conclusion that there was any impropriety on the part of the FLSB or the Association in entering into the settlement.

16. Local 272 also impugns the contents of an election leaflet circulated by the Association in the 24 hour period preceding both the vote and the section 89 settlement. The material portions of the leaflet read as follows:

... In the second place;

The salary grid for "non-affiliated" [employees]. A copy is attached. At the bottom of the page, the formula for calculating the salary of [those working] 40 hours, divide the amount by 35 and multiply by 40.

Here are two examples:

Tradespeople: level 5 from 36,680 to 43,200

Caretaker 40 hours: level 2 from 26,170 to 30,742

How is it that we are the only union to have filed complaints with the Labour Relations Board and with Pay Equity regarding this salary grid.

We filed a complaint in March [sic] 1989 to defend the right of our members to be paid according to the highest salary grid, and we did this before negotiations for a new collective agreement.

Where was Service and Commercial Employees Union????

The hearing in this complaint will be on January 17, 1991 at the Labour Relations Board, 240 Sparks.

As a result of discussions between counsel in the case, we shall shortly receive a copy of the report which is the foundation of this salary grid...

[translation]

17. Attached to the leaflet was the following:

SCHEDULE B

THE FRENCH LANGUAGE SCHOOL BOARD OF
OTTAWA-CARLETON

FULL BOARD

SALARY GRID FOR THE YEAR 1989 FOR NON-UNIONIZED
EMPLOYEES (for 12 months/35 hours per week)*

SALARY LEVEL	1	2	STEPS 3	4	5
XIII	92 616	96 702	100 788	104 874	108 960
XII	77 200	80 600	84 000	87 400	90 800
XI	73 500	76 800	80 000	83 300	86 500
X	61 200	63 900	66 600	69 300	72 000
IX	53 200	55 600	57 900	60 300	62 600
VIII	46 300	48 400	50 400	52 500	54 500
VII	40 300	42 100	43 800	45 600	47 400
VI	36 000	37 500	39 100	40 700	42 300
V	32 100	33 500	35 000	36 400	37 800
IV	28 600	29 900	31 200	32 400	33 700
III	25 600	26 700	27 800	29 000	30 100
II	22 900	23 900	24 900	25 900	26 900
I	20 400	21 300	22 200	23 100	24 000

* To calculate 10 month salary, use the following formula:

$$\frac{10 \times \text{salary}}{12}$$

* To calculate salary for 40 hours per week, use the following formula:

$$\frac{40 \times \text{salary}}{35}$$

[translation]

18. Although this grid refers to salary levels I through XII, there is no indication on the grid of where particular classifications may fall within those levels. The report referred to in the latter portions of the leaflet reproduced above appears to be a job evaluation report prepared by external consultants. This report contains information required to tie particular classifications to the salary levels contemplated by the grid. (Counsel for the FLSCB advised us that, in return for consenting to its request for an adjournment of an earlier hearing date in the section 89 complaint, the FLSCB undertook to provide the Association with a copy of the report.)

19. Jean Marc Landry is a school caretaker employed in the maintenance bargaining unit. On the evening prior to the representation vote he received a copy of the pamphlet. On reviewing the document he concluded that its application to his job would result in a very substantial wage increase. In the context of the imminent representation vote he interpreted the pamphlet as a message from the Association that its success in the representation vote would likely mean a significant wage increase for bargaining unit employees. However, Mr. Landry acknowledged that nothing in

the pamphlet indicated any actual agreement between the Association and the FLSB to increase salaries or any condition that wage increases were conditional upon an Association victory in the vote.

20. On the following day Mr. Landry and Marcel Surette, a Local 272 member not employed by the FLSB, acted as scrutineers on behalf of Local 272 in the representation vote. Mr. Landry testified that Michel Lavigne, an official of the Association, arrived at the poll about an hour and a half before it was scheduled to close. A question was raised about the section 89 proceedings which Mr. Lavigne had attended earlier in the day. Mr. Lavigne, however, declined to discuss any aspect of the complaint or the proceedings until after the polls were closed in accordance with an agreement between the FLSB and the Association. Both Mr. Landry and Mr. Surette testified that Mr. Lavigne (who did not testify) made certain statements about the settlement after the polls closed and the ballots were counted. In particular, Mr. Lavigne expressed the view that the settlement did include the maintenance bargaining unit and that it was a good thing the Association had won the vote because otherwise there was no deal.

21. Our analysis of the evidence and, in particular, the terms of the settlement already indicate that Mr. Lavigne's expressed view about the scope of the settlement is clearly mistaken. The settlement is limited to bargaining units other than the maintenance unit. Similarly, apart from the statements attributed to Mr. Lavigne, there is simply no evidence to suggest that the Association and the FLSB entered into an agreement to defeat the bargaining rights of Local 272. In any event, there is simply no evidence before us that the terms of the section 89 settlement were even known to any maintenance unit employees (except, of course, those who had directly participated in the settlement on behalf of the Association) until after the results of the vote were tabulated.

22. In its initial documents challenging the validity of the vote, Local 272 took the position that "the Association and the employer had signed an agreement providing for a substantial increase in wages to all members of the voted constituency, providing the Association was successful in the voting" and "that members of the voting constituency were aware of the agreement (and the fact that it was only to be effective if the Association was successful) prior to the voting". Based on the evidence before us, we are simply unable to conclude that there is any basis for these allegations and consequently, the cases referred to us by Local 272 which included *Trent Metals Limited*, [1979] OLRB Rep. Aug. 827; *Square D Electrical Equipment Inc.*, [1980] OLRB Rep. Sept. 1324; and *Crowle Electric Limited*, [1982] OLRB Rep. Oct. 1458 and which all involved instances of improper employer support are of no assistance to us in this matter.

23. By the conclusion of the hearing, Local 272 had shifted its emphasis. It was conceded that, strictly speaking, the section 89 settlement did not directly provide substantial wage increases for anyone, let alone maintenance employees. It was further conceded that, strictly speaking, the settlement did not include the maintenance unit. It was argued, however, that the leaflet was the critical document and that the Association had managed to create the impression in the minds of voters that the FLSB would implement the salary grid in the maintenance unit if the Association were successful in the vote. Thus, Local 272's real argument in the case concerns alleged improper electioneering rather than allegations of improper collusion and employer support designed to defeat its bargaining rights.

24. As early as 1959 the Board in *Stauffer-Dobbie Manufacturing Co. Ltd.*, 59 CLLC para. 18,147 at p. 1790 expressed its reluctance, except in extreme circumstances, to perform the function of policing election campaigns:

... A new vote will generally be directed where the action complained of is coercive in nature or if ways and means of destroying the secrecy of the ballot or the confidence of the employees in

the secrecy of the ballot are suggested or implied ... In the main, however, a considerable amount of leeway is permitted in electioneering. The Board does not undertake to police election campaigns or to consider the truth or falsity of campaign literature and speeches unless the ability of the employees to evaluate such literature or speeches is impaired e.g. by the use of campaign trickery, to such an extent that the free desires of the employees cannot be determined in a secret vote ... In determining the impact on the voters of the literature complained of, it is of course obvious that it is rarely, and perhaps never, possible to determine objectively what effect it has actually had. One cannot pay too much attention to either the most gullible voter or the one of firm convictions. One can only look at the circumstances of each case and, on the facts presented, determine whether the statements objected to are of such a nature that they are likely to have misled a "reasonable" voter.

25. These sentiments have been echoed and restated in more recent cases such as *Robertson-Yates Corporation Limited*, [1978] OLRB Rep. Jan. 30; *Indusmin Limited*, [1982] OLRB Rep. Nov. 1641; and *Cara Operations Limited*, [1985] OLRB Rep. Feb. 222 where, at paragraph 17 the Board observed as follows:

... it is not our function to assess whether the statements are false, misleading, unfair, defamatory or whether the propaganda campaign has been conducted fairly by both sides. Rather, we must decide whether the letter in this case has deprived the employees of the ability to exercise their "critical faculties" in assessing whether the respondent should continue to represent them in collective bargaining.

26. When we consider contents of the impugned leaflet even in the context of the balance of the evidence in this matter, we are unable to conclude that its contents are false, misleading or unfair. Neither are we convinced that the leaflet has impaired the critical faculties of the reasonable voter. In many ways the instant facts are not dissimilar from a scenario where an incumbent union facing a displacement representation vote in a part-time bargaining unit prepares a leaflet trumpeting its gains in a recently signed collective agreement in the corresponding full-time unit - a scenario which, on its face, strikes us as neither improper nor surprising. But perhaps the greatest irony in this case, from Local 272's perspective, results from its deliberate choice to not participate in the section 89 proceedings. Had it done so, it may well have been a signatory to the settlement it now impugns and had a share in whatever political capital may have been generated by the settlement and the process leading up to it. Having failed to take that decision, it is not for the Board to effectively rectify a difficult political decision which events may have proved to be misconceived.

27. It was for all these reasons that we dismissed Local 272's request in our decision dated April 23, 1991.

3448-90-R Hotel Employees Restaurant Employees Union, Local 75, Applicant v. Ronnie Gee's Sports Palace, Respondent v. The Westbury Hotel, Intervener

Sale of a Business - Parties acknowledging that sale of a business occurring - Successor employer arguing, however, that bargaining unit covering only part-time employees and that predecessor's collective agreement inappropriate - Successor asking Board to direct union to serve notice to bargain so that more appropriate collective agreement might be concluded - Board not acceding to successor employer's request - Board declaring successor bound by predecessor's collective agreement covering both full-time and part-time employees

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

APPEARANCES: *Gerry Jones* for the applicant; *Robert Statton* and *Ron Goyda* for the respondent; *Donald B. Jarvis*, *Andre Beland* and *Heather Black* for the intervener.

DECISION OF THE BOARD; May 23, 1991

1. This is an application under section 63 of the Act for a declaration that a sale of business occurred from the Westbury Hotel (Beaton's Lounge) to Ronnie Gee's Sports Palace (referred to in this decision as Ronnie Gee's), and that Ronnie Gee's is therefore bound by a collective agreement entered into by the applicant and The Westbury Hotel.

2. There was no dispute that a sale of part of a business had occurred, or that Ronnie Gee's is the successor employer. The dispute is over the consequences of those facts.

3. Prior to the sale, The Westbury Hotel operated Beaton's Lounge as one of the aspects of its total hotel operation. The Westbury Hotel is one of the employer parties to the master collective agreement between the Hotel Employers Group of Toronto and the applicant. The agreement reflects the fact that it contemplated an operation of an entirely different scale than the sports bar that Ronnie Gee's is. This is the fact which drives Ronnie Gee's request that we relieve it of the obligations of the hotel collective agreement as it is, in its submission, obviously inapplicable to its operation. It asks us to direct the union to serve notice to bargain, so that a more appropriate collective agreement might be concluded. The respondent relies on the Board's inherent jurisdiction, rather than any specific part of the successor rights provisions of the Act, for the Board's power to grant its request to be relieved of the obligations under the existing collective agreement.

4. Gee's also takes the position that the bargaining unit of which it is the successor employer only covers full-time employees. It wishes the Board to clarify this fact and note that there was only one full-time employee at the time of the transfer and that the balance of the employees are part-time. It gave notice of lay-off to the former employees in the Beaton's Lounge on January 7, 1991, and offered employment to three employees in late February, one full-time and two part-time. As of April 24, the terminal date in this matter, there were one full-time employee and three part-time. In its submission, the union's bargaining rights, as flowing from the original certificate, did not encompass part-time employees. It is argued that the union cannot have more than what it received in its certificate. However, Ronnie Gee's acknowledges that it would be affected by past practice at the hotel, although it maintains that is not relevant to the Board's determination.

5. The applicant takes the position that the matter is straightforward. The respondent acknowledges it is a successor employer. The collective agreement between the Westbury and the applicant covers full-time and part-time employees. Therefore the union argues there should be a

declaration that Ronnie Gee's is bound to the existing collective agreement and that it covers full-time and part-time employees. It submits there is no reason for it to give notice to bargain when the collective agreement expires in 1993. However, it made clear that it is not seeking to apply to Ronnie Gee's any provisions of the collective agreement that do not apply to the lounge operation, e.g. those in Article 38, which covers the Banquet Department.

6. The intervener and the applicant both agree that the bargaining unit covered by the collective agreement between them covers part-time employees. The respondent takes the position that neither the scope clause nor the rest of the collective agreement has that effect. Article 2 - SCOPE, reads as follows:

2.01 The Agreement shall apply to all full-time regular employees of the Employer whose classification or groupings are listed in the schedule attached hereto.

2.02 All employees who regularly work twenty-four (24) hours or more in any one week will be classified as full-time regular employees of the Employer.

2.03 "Part-time Employee" means an employee employed in the bargaining unit who regularly works less than twenty-four (24) hours per week.

2.04 Articles, 25.01, 25.02, 25.04 and Articles 29 30, 32, 33 and 34 shall not apply to part-time employees classifications except where specified in such schedules. The Employer shall insure that any new hires within the references existing scope of the General Agreement resulting from the creation of new work areas shall become Union members and shall enjoy the appropriate rates of pay and benefits for the classifications concerned.

2.05 The Union and Company agree that employees who are not covered under the scope, will not be normally scheduled to work and perform duties under any of the classifications unless in an emergency.

There are a number of other references to part-time employees in the collective agreement, e.g. Articles 21.13 and 25.05.

7. We are unable to accede to the respondent's requests. The purpose of section 63 is to preserve the union's bargaining rights to the extent possible when a sale of business occurs, within the bounds of the legislative provisions. The general provision in section 63(2) is that the successor employer will be bound by the collective agreement "as if he had been a party thereto", until the Board otherwise declares. The Act then provides for circumstances in which the Board may otherwise declare. There are circumstances under which the Board is given the power to relieve the parties of a collective agreement (section 63 (6) and (11), e.g.), but those circumstances are not the facts before us, nor were they argued to be. There is simply nothing in the facts before us which would cause us to relieve the respondent of the normal consequences of being a successor employer. The fact that there is language in the collective agreement that is inapplicable to its situation, or that it would not have negotiated, is not a ground found in the statute or the jurisprudence, and not one to which we are attracted. It would be the exception that swallowed the rule, for it is not unusual for a successor employer to be uncomfortable with what others negotiated.

8. As to the issue of part-time employees, the language of the collective agreement is quite clear on its inclusion of part-time employees, even if the arrangement of the scope clause is a bit unusual. Both the original parties to it agree that it covered part-time employees. The existence of a certificate for full-time employees only, if any, (which was not proven) is irrelevant since the rights in the certificate merge in the collective agreement. It is the collective agreement which defines the rights which pass on successorship. This is clear throughout section 63. The bargaining

relationship attaches as at the time of the sale, not at some earlier point. See among others *Briston Fashions*, [1990] OLRB Rep. March 223.

9. In the result, the Board declares that the respondent employer is bound by the collective agreement entered into between the intervener and the applicant. For the sake of clarity, we find that the collective agreement covers full-time and part-time employees.

3033-89-R; 0141-90-R Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351, Applicant v. R. V. Campbell Commercial Laundry Services (1985) Inc., Select Laundry Limited, **Select Commercial Laundries Inc.**, Respondents v. Peter Goodall, Intervener; Peter Goodall, Applicant v. Select Commercial Laundries Inc., and Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351, Respondents

Sale of a Business - Non-Unionized company ("S") and unionized company ("C") agreeing to incorporate new company ("SCL") and to act as equal owners - "S" and "C" ceasing operations and paying off employees - "SCL" hiring all former employees of "S" and "C" and using equipment and premises formerly used by "S" - "SCL" continuing to service former customers of "S" and "C" - Parties agreed that there had been sale of a business - Parties also agreeing that in the event Board should find "intermingling", Board should direct taking of representation vote - Board finding "intermingling" and directing vote

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. A. Correll* and *R. R. Montague*.

APPEARANCES: *L. Steinberg* and *C. Sookram* for Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351; *Thomas A. Stefanik*, *A. Amin Marfatia* and *Lee Davey* for R. V. Campbell Commercial Laundry Services (1985) Inc., Select Laundry Limited, Select Commercial Laundries Inc.; *C. J. Abbass* and *Peter Goodall* for the applicant/intervener.

DECISION OF N. B. SATTERFIELD, VICE-CHAIR, AND BOARD MEMBER W. A. CORRELL;
May 9, 1991

1. The names of the respondents in Board File No. 3033-89-R are amended to read: "R. V. Campbell Commercial Laundry Services (1985) Inc., Select Laundry Limited, Select Commercial Laundries Inc."

2. For reasons given below, Peter Goodall was added as an intervener to the application in Board File No. 3033-89-R.

3. In File No. 3033-89-R, the Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 ("the union") claims that there was a sale of a business from R. V. Campbell Commercial Laundry Services (1985) Inc. ("Campbell") to Select Laundry Limited ("Select") and/or Select Commercial Laundries Inc. ("SCL") and asks for a declaration that Select and/or SCL are bound by the collective agreement between Campbell and

the union which was in effect at the time of the sale. In the alternative, the union asks for a declaration pursuant to subsection 1(4) of the Act that Campbell, Select and SCL be treated as constituting one employer for the purposes of the Act. Peter Goodall, the applicant in File No. 0141-90-R also claims that there was a sale of business which took place on December 1, 1989 when Campbell and Select were purchased by SCL and asks the Board to determine whether Goodall and other employees of SCL constitute one or more appropriate bargaining units and, if so, order that a representation vote be held.

4. The first application was scheduled for hearing, but that hearing date was adjourned so that notice could be served on the parties of the second application. Both applications ultimately were listed for hearing together before this panel of the Board. At that hearing, counsel for Goodall claimed that he and two other persons employed by him were dependent contractors of SCL and, therefore, should the Board find that there has been a sale of a business from Campbell and/or Select to SCL, there would be an intermingling of Goodall and the other two employees with the employees of SCL who were the former employees of Campbell and Select. Counsel for Goodall advised the Board that Goodall was interested only in the issue of intermingling and would call evidence, if needed, and make argument only in respect of that issue. Discussions between the two applicants and the submissions of the parties to the Board on how to proceed resulted in the Board making Goodall an intervener in the application in File No. 3033-89-R, and in counsel for Goodall agreeing that his application be stood down. He subsequently advised the Board that he would not be proceeding with that application. In those circumstances, the proceedings in File No. 0141-90-R are terminated.

5. With respect to the request in File No. 3033-89-R for a declaration pursuant to subsection 1(4) of the Act, prior to the commencement of argument, counsel for the union advised the Board it would not be pursuing that part of its application. Accordingly, the application for a declaration that the three respondents be treated as constituting one employer for purposes of the *Labour Relations Act* is dismissed.

6. Counsel for the respondents took the position in his pleadings and in his opening statement that, should the Board find a sale of a business within the meaning of section 63 of the Act, there had been intermingling of the employees of the businesses within the meaning of subsection (6) of section 63 and asked the Board to direct the taking of a representation vote of those employees to determine whether they wished to continue to be represented by the union.

7. The Board heard the evidence of Amin Marfatia, owner of Campbell and witness for the respondents. He was forthcoming and candid and discharged fully the evidentiary onus of the respondents under subsection 63(13) of the Act. The essential facts derived from his evidence are not in dispute.

8. The events giving rise to this application began in the latter part of 1989. Prior to December 1, 1989 Campbell and Select operated commercial laundry businesses serving similar kinds of customers. As between them, there was no common ownership, control or direction. Campbell operated its business out of premises at 25 Windsor Street, Etobicoke and Select operated its business out of 433 Horner Avenue, Etobicoke. Campbell's full-time laundry employees are represented in collective bargaining by the union. Select's employees are unrepresented. When Marfatia was unable to renew Campbell's lease, his search for new premises brought him into discussions with the owner of Select. Their discussions eventually led to the execution of a letter of intent on November 14, 1989 to incorporate a new company, Select Commercial Laundries Inc., and be its equal owners. Some terms of the letter are:

- (1) An agreement that Campbell and Select shall transfer, assign and/or sell the following assets to SCL:
 - (a) goodwill, customer lists, business operations and the exclusive rights to the names of Campbell and Select;
 - (b) all business furnishings.
- (2) Select shall convey to SCL all of its rights in its lease at 433 Horner Avenue.
- (3) SCL shall have absolute rights to the use of all of the furnishings and equipment to be transferred from Campbell and Select.
- (4) All equipment and furnishings transferred from Campbell and Select shall be physically located at 433 Horner Avenue.

9. SCL was incorporated by Articles of Incorporation effective November 28, 1989. Campbell and Select ceased operating their respective laundry businesses on November 30, 1989 and paid off all of their employees. On December 1, 1989 SCL commenced operations at 433 Horner Avenue, hiring all of the former employees of Campbell and Select and using the equipment, furnishings and premises formerly used by Select in the operation of its business. SCL continued serving the former customers of Campbell and Select from those premises using the equipment and furnishings formerly used by Select and the equipment and furnishings of Campbell as soon as they could be accommodated at that location. All of Campbell's and Select's former businesses were carried on by SCL on and after December 1st.

10. At December 1st, SCL employed five full-time and five part-time former employees of Campbell and eight to ten full-time and ten part-time former employees of Select. The evidence about Goodall is limited and establishes little more than that he was an employee of Select until November 30th and beginning December 1st he took a subcontract from SCL to do the washing, using the same equipment on which he had worked as an employee of Select. He later hired two persons who were not employees of Select. From the date of its incorporation on November 28th to and including November 30th, SCL had no employees. The only employees hired by SCL during December were the former employees of Campbell and Select.

11. Campbell and the union were bound to a collective agreement in effect on the December 1st transaction date under which the union was the exclusive bargaining agent for Campbell's full-time laundry employees. As at December 1st, SCL employed five former full-time employees of Campbell and ten former full-time employees of Select. Approximately six months later, SCL's full-time employees consisted of four former employees of Campbell, six former employees of Select and one person hired to replace a former Campbell employee who left employment from SCL.

12. On those facts, the parties agreed that the letter of intent executed by Campbell and Select and the Articles of Incorporation issued to SCL are evidence that there has been a sale of Campbell's business to SCL within the meaning of section 63 of the Act, and the Board so finds. The remaining issue is whether there has been an intermingling within the meaning of subsection 63(6) of the Act of the employees of Campbell's business with those of any other business carried on by SCL. If so, the parties agree that the Board should direct the taking of a representation vote. The Board accepted their agreement, therefore it did not receive evidence or argument respecting any other form of remedy. Subsection 63(6) and other relevant subsections provide as follows:

63.-(1) In this section,

• • •

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
- (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represent the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

• • •

(6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the business with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;

- (c) declare which trade union, trade unions or council of trade unions, if any shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

...

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes as it considers appropriate.

...

13. Counsel for the union argues that there has been no intermingling of employees within the meaning of subsection 63(6) of the Act on the following grounds. The subsection establishes three preconditions in order for there to be an intermingling of employees. These are:

- (1) the person to whom the business is sold must carry on one or more other businesses;
- (2) a trade union must be the bargaining agent for employees of one of those businesses; and
- (3) the person to whom the business is sold must intermingle the employees of one of the businesses with those of another of the businesses.

Counsel takes the position that those conditions and the language of the subsection require the purchaser of the unionized employer (SCL) to have a pre-existing business in order for subsection 63(6) to apply. It cannot be an intermingling unless the employees of an employer who were represented by a trade union are intermingled with the employees of a company of the purchaser. On the facts of this application there is no intermingling; what has happened is more akin to an accretion to the bargaining unit inherited by the purchaser. Therefore, the Board ought to respect the fundamental purpose of subsection 63(2) and preserve the union's bargaining rights. This is so according to counsel, because there has been no sale of Campbell to Select. Campbell has been sold to SCL and SCL as purchaser is the "person" who, pursuant to subsection 63(6), must be carrying on one or more businesses. On November 28th when SCL was incorporated, it was nothing more than a corporate entity. It had no business and no employees. Section 63 preserves the union's bargaining rights as at the date of sale which, in this case, was at the moment of incorporation of SCL on November 28th. Since SCL did not have any business or any employees until December 1st, there could be no intermingling regardless of where the employees came from on December 1st. On those grounds, counsel concludes that there has been no intermingling within the meaning of subsection 63(6). Rather, there has been an accretion to the bargaining unit described in the collective agreement to which SCL became bound because of the sale and the union's bargaining rights should flow through to SCL.

14. Counsel referred the Board to the following decisions in support of his argument:

Bermay Corporation Limited, [1980] OLRB Rep. Feb. 166; *Caressant Care Nursing Home of Canada Limited*, [1984] OLRB Rep. Aug. 1060; *Antonacci*

Clothes Inc., [1984] OLRB Rep. July 887; and *Daynes Health Care Limited*, [1985] OLRB Rep. March 387.

15. In *Bermay Corporation Limited*, a unionized business, Goldcrest, was purchased by Bermay, a non-union business. Bermay moved its employees into Goldcrest's premises. In a prior decision, the Board had found that to be an intermingling within the meaning of subsection 63(6) of the Act and directed that a representation vote be taken. The decision on which union counsel is relying deals with a later request of Bermay to have the vote set aside, which raised an issue of whether the union's collective agreement which had been binding on Goldcrest at the time of the sale was still binding on Bermay. Counsel relies substantially on the Board's comments at paragraph 26 which he submits are made in response to the argument that the collective agreement should be terminated:

26. ... The only part of [section 63] which specifically empowers the Board to declare that a collective agreement is no longer binding on a successor employer is subsection 6(a). That is to say that the discretion only comes into play when there has been an intermingling of employees. *When a unionized business is transferred to an employer who does not introduce employees from another business into the bargaining unit of predecessor employees, the Board does not have a discretion to declare that a collective agreement no longer binds the successor employer. Nor does the Board have that discretion when the sale of a business has occurred and all of the employees are either newly hired by the successor employer or entirely transferred from another of its businesses. The discretion arises only when there has been a mixing of employees from another business with the employees of the transferred business. In that circumstance the ability to declare a collective agreement no longer binding is a necessary part of the Board's jurisdiction to resolve conflicts in bargaining rights. The intermingling of employees is the linchpin of the Board's jurisdiction to declare a collective agreement no longer binding....*

[emphasis added]

Counsel points to the fact that the Board is saying that it only acquires a discretion under subsection 63(6) where there has been an intermingling. Counsel emphasizes that the Board in *Bermay* was recognizing that there is no intermingling when "... a unionized business is transferred to an employer who does not introduce employees from another business into the bargaining unit of predecessor employees, or when the sale of a business has occurred and all of the employees are either newly hired by the successor employer or entirely transferred from another of his businesses.". According to counsel, the latter of those two conditions describes this case on its facts. In order for there to be intermingling within the meaning of subsection 63(6), he contends, there must be a mixing of employees from the unionized business which was sold with the employees of the purchaser, as would have been the case on these facts had Campbell been sold to Select instead of to a new third company set up by them. That would have been a classic intermingling, but it does not arise where, as here, the unionized business was sold to a newly created entity which has no business and no employees.

16. In *Caressant Care*, *supra*, the Board was dealing with a situation where one nursing home operator, Caressant Care, took over the license of a prior nursing home, Willson, and combined the licenses of Caressant Care and Willson in a new facility. The former employees of Willson were intermingled in the new facility with the employees of Caressant Care. The Board found that to be a subsection 63(6) intermingling. Counsel relies in particular on the following extract from paragraph 32 of the decision in support of his argument that the purchaser must have one or more businesses which pre-exist the sale in order for there to be an intermingling under subsection 63(6):

32. ... The applicant relies chiefly on the comments of the Board in *Bermay Corporation*

Limited, [1980] OLRB Rep. February 166. At paragraph 26 of that decision, the Board commented on the discretion given it under section 63 (then 55) subsection (6) as follows:

... the discretion only comes into play when there has been an intermingling of employees. When a unionized business is transferred to an employer who does not introduce employees from another business into the bargaining unit of predecessor employees, the Board does not have a discretion to declare that a collective agreement no longer binds the successor employer. Nor does the Board have that discretion when the sale of a business has occurred and all of the employees are either newly hired by the successor employer or entirely transferred from another of its businesses. The discretion arises only when there has been a mixing of employees from another business with the employees of the transferred business....

We agree with that statement. All three examples referred to by the Board do not deal with cases of two businesses being merged or "intermingled". They deal with the staffing and operation of one business only. The first example is the simplest, where no new employees whatever are used to staff the purchased business. The second example is where all employees are hired "off the street", as it were, to staff the purchased business. And the third is where the purchased business, once again, is *not* being run in an integrated way with another business owned by the purchaser, but the purchaser uses employees from that other business to staff the new business nonetheless. None of these are cases of "intermingling", within the meaning of section 63(6), and none of these give rise to the forms of relief which that subsection provides. Indeed, where a business covered by a collective agreement is purchased and is not expanded by or integrated with the work provided by a second existing 'business', it is difficult to see how the provisions of section 63(6) can be meant to apply at all, irrespective of where the employees may be drawn from. A purchasing employer does not, in other words, create a situation where the bargaining rights attaching to a single, newly-acquired business are called into question simply by supplementing the bargaining unit with employees not previously covered by the collective agreement, whether those employees are selected from "off the street", or from an entirely different location of the employer. A purchaser dealing with a single business is in the same shoes as the vendor *vis-a-vis* the collective agreement....

[emphasis in the original]

Counsel focuses in particular on the Board's comments that there is no intermingling within the meaning of subsection 63(6) "... where the purchased business, ..., is *not* being run in an integrated way with another business owned by the purchaser, but the purchaser uses employees from that other business to staff a new business nonetheless." [emphasis in the original], and the further comment that, "... where a business covered by a collective agreement is purchased and is not expanded by or integrated with the work provided by a second existing 'business', it is difficult to see how the provisions of section 63(6) can be meant to apply at all, irrespective of where the employees may be drawn from."

17. Counsel reads both *Bermay* and *Caressant Care*, *supra*, to stand for the proposition that, if the Board is to have the discretion to grant relief under subsection 63(6), it requires the purchaser to intermingle employees of the purchased business with employees of a pre-existing business run by the purchaser. In other words, in order for there to be intermingling within the meaning of subsection (6), the purchaser must have carried on one or more businesses prior to the sale and, after the sale, mixed one or more of them with the business and employees of the purchased company. There is no intermingling where the purchaser has no pre-existing employees and business. Therefore, on our facts, counsel contends that there is no intermingling because the employees of Campbell and Select are new employees entering the existing bargaining unit inherited by SCL from Campbell with the purchase of Campbell's business.

18. In *Antonacci*, *supra*, there was a sale of the production function of a clothing supplier to *Antonacci*, a company incorporated for the purpose of acquiring that part of the vendor's business. The purchaser Antonacci hired some of the vendor's former employees and some new employees

and merged them. It was argued that this was an intermingling pursuant to subsection 63(6). The Board found that there was no intermingling and, on the way to that conclusion, commented as follows at paragraphs 27 and 28:

27. ... We do not understand the quoted references to "new employees" as suggesting that the Board will order a representation vote whenever a successor employer hires, at or shortly after the time of a sale, persons who were not previously employed by the predecessor employer. The "new employees" referred to by the Board in *Bermay Corporation Limited* were employees hired simultaneously with the consolidation by Bermay of its existing furniture business with the business it purchased from Goldcrest and the consequent intermingling of Bermay's former employees with employees formerly employed by Goldcrest. The Board's resort in *Bermay Corporation Limited* to its powers under section 63(6) did not depend on the presence or absence of "new employees", but on the intermingling of employees identified with the two pre-existing bargaining units. It may not have been possible, and in any event was not necessary, for the Board to determine whether the "new employees" represented an accretion to one or other or both of those pre-existing bargaining units. The important fact was that the merger of businesses had made it necessary to redefine bargaining units and, as a result, bargaining rights; it was that exercise, and not the hiring of "new employees", which created the representation issue to which the Board responded by ordering a representation vote.

28. In this case, the respondent Antonacci Clothes came into existence for the purpose of engaging in the transaction which we have found constituted a sale of business within the meaning of section 63. The only business in which this respondent has engaged is the business it purchased from British Brand. All its employees can therefore be described as falling within the "like" bargaining unit in respect of which the applicant's bargaining rights are preserved by our finding that there has been a sale of business. If one disregards the change in ownership of the business in question, the situation here is this: a small number of the employees employed in the business prior to February 1st are no longer employed in it, and another, larger, number have since been hired to work in the business. Those circumstances would not normally give rise to a question of representation, unless it were a question raised in a timely manner by the employees themselves. The fact that some employees are new to the unit is of no more consequence than it would have been had the ownership of this business remained unchanged. The change of ownership does not change that result where, as here, the sale of business has not itself created circumstances which give rise to a question of representation.

Counsel points out that the Board in *Antonacci* found that there was no intermingling when the purchaser, Antonacci, hired some of the vendor's former employees and brought them together with employees newly hired by Antonacci after the bargaining rights of the union for the predecessor's employees had transferred to Antonacci as a result of a section 63 sale of the business. SCL, like Antonacci, was created to be the purchaser of the businesses of Campbell and Select. As a result of the purchase of Campbell's business, the union's bargaining rights for Campbell's employees had transferred to SCL pursuant to section 63. The former employees of Campbell and Select were hired by SCL and merged in its business. According to counsel, that is no different than what took place in *Antonacci* and, like *Antonacci*, does not constitute an intermingling within the meaning of subsection 63(6).

19. In *Daynes, supra*, Daynes was a nursing home operator which acquired the nursing home license of another operator whose employees were represented by a trade union. The license was used for a new nursing home facility operated by Daynes. It hired employees from another of its nursing homes to staff the facility. The Board found that the transfer of the license was a section 63 sale of a business and, as a result, Daynes was obligated to staff the new facility with employees of the predecessor nursing home operator. That gave rise to an issue of whether the mixing of those employees with the employees of another nursing home business of the purchaser who were already employed at the new facility was an intermingling under subsection 63(6). The Board found it was not because there had not been an intermingling of two or more businesses, only an intermingling of employees. That circumstance did not satisfy subsection 63(6) and it was distin-

guishable from the circumstances in *Caressant Care, supra*, where the Board had found intermingling.

20. The argument of counsel for the respondents runs as follows. SCL did three things which make this application a classic case of intermingling. These were:

- (1) it bought the businesses of both Campbell and Select;
- (2) it hired the employees of both Campbell and Select; and
- (3) it put the businesses and the employees physically together at Select's former premises and operated the merged businesses from there.

Counsel argues further that there was no sale on November 28th, as argued by counsel for the union. A section 63 sale is about a sale, transfer or other disposition of a business. All that happened on November 28th was SCL's incorporation. That is simply an historical event and not a sale, transfer or other disposition of a business. On December 1st, there was at least a sale of part of a business with the hiring by SCL of the former employees of Campbell and Select and the commencement of laundry operations at 433 Horner Avenue. On the basis of that sale, subsection 63(6) falls into place because Campbell and Select each sold its business to SCL and the employees of one business, Campbell, had a trade union as their bargaining agent and SCL intermingled those employees with the employees of Select who were not represented by any trade union. SCL then carried on those businesses under one corporate umbrella. The fact that SCL was newly incorporated for purposes of the purchase does not prevent the Board from finding an intermingling of the businesses and employees of Campbell and Select within the meaning of subsection 63(6). Counsel asked the Board to consider what would be the result if Select's employees had been represented by a trade union, but not the same one which represented Campbell's employees. It would be said in those circumstances that the bargaining rights of those employees flow through to SCL and it would have two unions claiming bargaining rights for the former employees of both employers. That would cause the Board to direct the taking of a representation vote. It should be no different when, instead of two competing bargaining agents, there is a group of employees represented by a trade union and another group of employees unrepresented. In either situation subsection 63(6) would apply. The second situation is the case at hand, counsel submits.

21. Turning to the case law, counsel points out that the example of "no intermingling" cited in *Caressant Care, supra*, on which union counsel is relying is not the instant case. This is because SCL owns the businesses formally owned by Campbell and Select and is running them in an integrated way. Counsel submits that the instant case matches the example given in the following extract from paragraph 32 of that decision where there is a union business and a non-union business and both are bought and integrated by the purchaser:

... The focus of section 63 is on the *business*, and it is the practical problem of running two *integrated* businesses, either each ostensibly under a different collective agreement, or one under a collective agreement and one "non-union", which would appear to have prompted the Legislature to provide the relief contemplated by subsection (6). And consistent with this rationale behind the subsection, it is only the employees of the business that was sold which continued to be covered by the collective agreement, just as in subsection 3 a trade union "continues to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit *in that business*."....

22. Counsel points out that, at paragraph 19 of *Bermay, supra*, the Board states that section 63(6) is designed to deal with the need to make adjustments when the non-union employees of the

successor employer are intermingled with employees whose terms and conditions of employment have been regulated under the collective agreement handed down from a predecessor employer. Counsel submits that, if union counsel is correct in his argument that there is no intermingling when a new entity is the purchaser, there could never be intermingling when a new entity is created to be the purchaser.

23. Counsel for the respondents distinguishes *Daynes* and *Antonacci, supra*, on their facts. Counsel claims that this can be seen from the Board's reasoning at paragraph 12 of *Daynes* and at the middle of paragraph 28 of *Antonacci*.

24. In summary, counsel for the respondents argues that the creation of SCL as the purchaser of a union business and a non-union business cannot take this case out of subsection 63(6) when the businesses are still carried on after the sale.

25. Counsel for the intervener adopts the argument of counsel for the respondents. In addition, counsel submits that section 63 deals with businesses and in this case there was no period when businesses were not being carried on. Campbell and Select operated their businesses until November 30th. Campbell's employees moved to SCL and worked along side of Select's employees, using Select's equipment at first and then their own equipment after it was transferred to Select's former location. Were the Board to allow the union's argument in those circumstances, it would result in a grab of bargaining rights by the union which the Legislature did not intend section 63 to allow. Allowing the union's argument would also have the effect of denying Goodall and other employees the chance to say whether they want the applicant to represent them and that would be contrary to the purpose of subsection 63(6).

26. Union counsel's rebuttal argument runs as follows. First, subsection 63(4) of the Act provides a remedy for the problems created by the facts of the hypothetical situation posed by counsel for the respondents. Therefore, in circumstances where two unionized businesses are purchased by a newly created entity, there would be no need to rely on subsection 63(6). Instead, the remedy would be provided by subsection 63(4). Second, with respect to the Board's observation at paragraph 19 of *Bermay, supra*, that subsection 63(6) is designed to deal with the need to make adjustments when the non-union employees of the successor employer are intermingled with employees whose terms and conditions have been regulated under the collective agreement handed down from the predecessor employer, the Board's cases say that the subsection can only operate when the purchaser has a pre-existing business and pre-existing employees who are not represented by a trade union. In the instant case the purchaser, SCL, had neither a business nor employees to intermingle with Campbell's business and employees, whether the transaction is examined at November 28th or December 1st. Finally, subsection 63(6) is there to protect existing employees of the purchaser, not new employees, therefore it does not come into play in the circumstances of this application, according to union counsel.

27. As the Board stated at the outset of this decision, the application in File No. 3033-89-R sought a declaration of a sale of a business from Campbell to SCL pursuant to section 63 of the Act, or alternatively, a declaration under subsection 1(4) that they be treated as constituting one employer for purposes of the Act. The two sections are commonly pleaded in that manner, whether in a single application like this one, or in separate applications. This is not surprising because, to a certain extent subsection 1(4) and section 63 are complementary. See *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536, at paragraph 40, wherein the Board observed that "...[b]oth sections are designed to preserve the collective bargaining status quo despite commercial transaction[s] which alter the legal identity of the employing entity, and would consequently undermine established bargaining rights." While subsection 1(4) gives the Board a broad discretion to

remedy mischief in the form of the frustration or erosion of bargaining rights which might result where two or more entities carry on associated or related activities or businesses under common control or direction, section 63 operates to preserve the effects of certification or collective agreements when the legal identity of the employer has changed because of a sale of a business within the meaning of subsection 63(1) of the Act until the Board otherwise declares. The Board described that effect of section 63 as follows in *Marvel Jewellery Limited and Danbury Sales (1971) Ltd.*, [1975] OLRB Rep. Sept. 733:

Section [63] recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.

28. Unlike the Board's broad discretion under subsection 1(4) to deal with the consequences of a finding that two or more entities carry on associated or related activities under common direction or control, when the Board finds that there has been a section 63 sale of a business, the successor employer is bound until the Board declares otherwise. Subsections (4), (5), (6) and (8) provide particular bases on which the Board might declare that a collective agreement or collective bargaining rights no longer bind a successor employer. The issue in this application is whether, because of the circumstances of the sale, the Board has the discretion which comes with a finding that there has been an intermingling of employees within the meaning of subsection (6). If it has that discretion, since the Board has accepted the agreement of the parties that the appropriate relief would be to direct the taking of a representation vote, a discretion it has under subsection (8), the Board would exercise its discretion in clause (a) of subsection (6) to declare that SCL is no longer bound to the union's collective agreement with Campbell should a majority of the eligible voters who cast ballots express the wish not to be represented any longer by the union in their employment relations with SCL. Should a majority express the contrary wish, the union's bargaining rights under the collective agreement would continue in force until terminated by operation of other sections of the Act, for example, by a successful application made under subsection 57(2) by bargaining unit employees for termination of the union's bargaining rights. Such an application can be made during the "open" period of the collective agreement. However, upon the application of any "... person, trade union or council of trade unions concerned,...", under subsection 63(6) the Board can direct the taking of a representation vote under subsection 63(8) in order to decide whether the remedy in clause 63(6)(a) should be granted, and in effect, this advances the time when the union's bargaining rights otherwise could be challenged under the Act. See *Antonacci, supra*, at paragraph 24.

29. The legislative rationale for subsection (6) was discussed by the Board in *Caressant Care, supra*, at paragraph 32. The discussion follows immediately upon the passage quoted above at paragraph 16 on which union counsel relies and part of the discussion appears at the start of the passage relied on by counsel for the respondents which is quoted at paragraph 21 above. Therefore, the Board will set out the entire paragraph in order to put the discussion in context. The discussion is the text between the []:

32. But the applicant argues that any and all employees of Caressant Care in the City of St. Thomas were covered by the scope clause of the collective agreement it "inherited", so that no "intermingling" of union and non-union businesses or employees could be said to have taken place subsequently. The Willson agreement states that it applies to:

All employees of the Willson Nursing Home Limited at St. Thomas, Ontario, save and except supervisor, persons above the rank of supervisor, registered nurses, per-

sons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and office staff and,

All employees of the Willson Nursing Home Limited at St. Thomas, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff.

The applicant relies chiefly on the comments of the Board in *Bermay Corporation Limited*, [1980] OLRB Rep. February 166. At paragraph 26 of that decision, the Board commented on the discretion given it under section 63 (then 55) subsection (6) as follows:

... the discretion only comes into play when there has been an intermingling of employees. When a unionized business is transferred to an employer who does not introduce employees from another business into the bargaining unit of predecessor employees, the Board does not have a discretion to declare that a collective agreement no longer binds the successor employer. Nor does the Board have that discretion when the sale of a business has occurred and all of the employees are either newly hired by the successor employer or entirely transferred from another of its businesses. The discretion arises only when there has been a mixing of employees from another business with the employees of the transferred business...

We agree with that statement. All three examples referred to by the Board do not deal with cases of two businesses being merged or "intermingled". They deal with the staffing and operation of one business only. The first example is the simplest, where no new employees whatever are used to staff the purchased business. The second example is where all employees are hired "off the street", as it were, to staff the purchased business. And the third is where the purchased business, once again, is *not* being run in an integrated way with another business owned by the purchaser, but the purchaser uses employees from that other business to staff the new business nonetheless. None of these are cases of "intermingling", within the meaning of section 63(6), and none of these give rise to the forms of relief which that subsection provides. Indeed, where a business covered by a collective agreement is purchased and is not expanded by or integrated with the work provided by a second existing "business", it is difficult to see how the provisions of section 63(6) can be meant to apply at all, irrespective of where the employees may be drawn from. A purchasing employer does not, in other words, create a situation where the bargaining rights attaching to a single, newly-acquired business are called into question simply by supplementing the bargaining unit with employees not previously covered by the collective agreement, whether those employees are selected from "off the street", or from an entirely different location of the employer. A purchaser dealing with a single business is in the same shoes as the vendor vis-a-vis the collective agreement.

[It is true that the subsection speaks of the purchaser intermingling the *employees* of one business with those of another. But that appears to be simply a more precise way of referring to the intermingling of the businesses themselves: it is in fact the "employees" of the businesses who are capable of being "intermingled". The focus of section 63 is on the *business*, and it is the practical problem of running two *integrated* businesses, either each ostensibly under a different collective agreement, or one under a collective agreement and one "non-union", which would appear to have prompted the Legislature to provide the relief contemplated by subsection (6). And consistent with this rationale behind the subsection, it is only the employees of the business that was sold which continue to be covered by the collective agreement, just as in subsection 3 a trade union "continues to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit *in that business*". That subsection provides:

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal,

with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

Were it otherwise, i.e., if the collective agreement or bargaining rights immediately applied to the employees of *both* businesses upon an intermingling, the language of subsection (6) would mean in a "two-union" situation that both collective agreements would apply to all employees of both businesses "until the Board otherwise declares", with whatever conflicting liabilities might arise from that for the employer pending a determination by the Board. We do not think that that is what the Legislature intended.]

Indeed, this precise point was one of the early ones which the Board had to decide under the 1970 amendments preserving collective agreements in addition to bargaining rights, in the case of *Bryant Press Limited*, [1977] OLRB Rep. April 301. There similar businesses of the vendor, McCorquodale and Blades, and of the purchaser, Bryant Press, were merged at one location, and the Board wrote:

5. Counsel for the [trade union] submits that the collective agreement between the [trade union] and McCorquodale & Blades bound not only the former composing room and proof room employees of the latter company, but also was binding upon the composing room and proof room employees of Bryant, since Bryant, by the provisions of subsection (2) of section 55, in effect, became a party to the collective agreement and its composing room and proof room employees fall within the recognition clause of the agreement. This being so, counsel submits there has not been an "intermingling" of employees as contemplated by subsection (6) of section 55 and accordingly there is no basis for the Board to make any other declaration than that the [union] acquired the bargaining rights for the composing room and proof room employees of both the vendor and purchasing companies as a result of the sale by virtue of the [union's] collective agreement with the vendor.

6. Subsection (2) of section 55 provides that the purchaser of a business is bound by a collective agreement entered into by the vendor as if he had been a party thereto. The parties to the collective agreement in the instant case were the respondent and McCorquodale & Blades and the employees bound by the agreement prior to the sale were the composing room and proof room employees of McCorquodale & Blades. As we read subsection (2), *it is implicit in the language of the subsection that the employees bound by the collective agreement subsequent to a sale are only those employees who were bound by the collective agreement prior to the sale.* [Emphasis added] In the instant case this means the former composing room and proof room employees of McCorquodale & Blades. The above interpretation of subsection (2), moreover, is consistent with the purpose of section 55 which is to preserve existing bargaining rights held by a trade union as a result of the sale of a business. The intent of the section was not to give to a trade union bargaining rights which it had not previously held. We would further point out that subsection (3) lends support to the above interpretation of subsection (2). More particularly, subsection (3) provides that a trade union which holds bargaining rights for a unit of employees of a vendor continues to hold those bargaining rights for the employees of the purchaser in the *like* bargaining unit. By analogy with subsection (3), the unit of employees covered by a collective agreement which becomes binding upon a purchaser under subsection (2) would also be the employees in the *like* bargaining unit. For the foregoing reasons, we cannot accept the interpretation placed on subsection (2) of section 55 by counsel for the [Union]. We find rather that as of the date of the sale of the business of McCorquodale & Blades and Bryant on March 15, 1971, the collective agreement to which Bryant became a party by reason of the sale only remained binding on the former employees of McCorquodale & Blades. Accordingly, once the intermingling of the employees of the two companies commenced, Bryant was entitled to make the instant application and to apply for the remedies available under subsection (6) of section 55.

This appears to us after further experience to be the only conclusion consistent with the language and objectives of section 63, and to the extent that the Board in *Bermay Corporation Limited* felt compelled to cast doubt on the correctness of *Bryant Press*, we find ourselves not able to agree with that portion of *Bermay*. It should be noted that the Board in *Bermay* had

before it a situation where the business of the purchaser was poured into the location covered by the collective agreement of the vendor, and the Board may well have viewed the circumstances before it as more akin to an “accretion”. It might also be noted that the comments of the Board in *Bermay* came only after the Board had *already* taken a representation vote because of the “intermingling”.

[emphasis in the original
except where noted otherwise]

30. The intermingling question which was before the Board in *Caessant Care*, *supra*, arose when Caessant Care acquired the nursing home license of another nursing home operator, Willson, and transferred the license, together with Willson’s nursing home residents, to a new nursing home facility which Caessant Care had constructed for its existing business. The Board found that transaction to be a section 63 sale of a business. The Willson nursing home employees had been covered by a collective agreement, the Caessant Care employees were not. The Willson employees were transferred to the new Caessant Care home along with the former Willson residents. The union’s argument that Caessant Care and its employees were bound by the union’s collective agreement with Willson as a result of the sale is referred to at the beginning of paragraph 32. The Board disagreed and, for the reasons given in paragraphs 33 and 34 quoted below, found that Caessant Care had intermingled Willson’s business and employees with Caessant Care’s business and employees.

33. It follows from *Bryant Press* that the bargaining rights extended to a purchaser by the operation of the province’s “sale of business” legislation are somewhat more particularly defined than are bargaining rights obtained either through certification or voluntary recognition: i.e. by the business itself. Like section 1(4) of the Act, in other words, section 63 is remedial legislation designed to preserve, but not extend, the *status quo*. Section 63(2) states that the purchaser becomes bound by the collective agreement “as if he were a party thereto”. What it comes down to is the effect the Legislature had in mind for the legal fiction created by those words. As can be seen in the passage quoted above, the Board in *Bryant Press* looked for guidance in that regard to subsection 3 of section 63, which was the original “successor rights” provision in the statute, and which provided the *lesser* remedy of preserving a union’s bargaining rights only. That original subsection made it explicit that such bargaining rights were, on a “sale”, being made to run only with “the *like* bargaining unit *in that business*”. The Board in *Bryant Press* found it to be the intention of the Legislature that the legal effect of the employer being deemed to be a party to the collective agreement under subsection 2 is circumscribed in exactly the same way. That is, under section 63(2) the scope clause into which the purchaser is inserted remains specific to the business initially covered. If, for example, an employer operates six Nursing Homes in the City of St. Thomas, the employees of none of which had ever indicated a desire to be represented by a trade union, and that employer purchases a seventh Nursing Home which is unionized and has a collective agreement, the other six Nursing Homes do not on the day of the “sale” become covered by the collective agreement, even if it is stated in its scope clause to apply to “all employees [of a named company] in the City of St. Thomas”. That is the thrust of the union’s submission on the effect of the earlier sale here.

34. We do not so find. Rather, we find that, commencing July 4, 1984, the employees of a business covered by a collective agreement (the 75-beds of the Willson Nursing Home) were intermingled with the employees of a business not covered by a collective agreement (the 41-bed Nursing Home and the 40-bed Rest Home that Caessant Care had on its own). The provisions of section 63(6) must therefore be applied, and this normally is done on the basis of comparative numbers. In *Bryant Press*, for example, one-third of the combined employees came from the operation covered by the collective agreement, and two-thirds were unrepresented by any trade union. The Board directed the taking of a representation vote....

31. The decision in *Caessant Care* fits with union counsel’s interpretation of subsection (6) because Caessant Care intermingled its pre-existing, non-union business and its employees with the business and employees of the “unionized” business purchased from Willson. In that respect,

counsel acknowledged that, had Select purchased Campbell and intermingled the two businesses and their employees at Select's 433 Horner Avenue premises, subsection (6) would apply. In the Board's view, an analogous situation would exist had SCL bought Select the day before it purchased Campbell's business and intermingled Campbell's business and employees with the former business and employees of Select. Section 63 would have no application to the sale of Select to SCL, but the sale of Campbell to SCL would be the sale of a business within the meaning of section 63 and, if the former business operations and employees of Select and Campbell were merged into a single operation by SCL, there is no doubt that the factual foundation would exist for a finding that there has been intermingling within the meaning of subsection (6).

32. Should the result be any different here because the section 63 sale of Campbell to SCL took place simultaneously with the sale of Select to SCL and the merging of Campbell's and Select's former businesses and employees? As the Board herein understands the purpose of section 63 and the effect of a finding that there has been a section 63 sale, whether under subsections (2) or (3), and the rationale behind subsection (6) as discussed in *Caressant Care, supra*, and in the Bryant Press decision referred to therein, the practical results of the two hypothetical situations posed above and the facts of the sale herein are the same. Campbell's business has been sold to SCL and, by operation of section 63, the union's bargaining rights and collective agreement have followed the business (*Marvel Jewellery, supra*). Had SCL been dealing only with Campbell's business, SCL would stand in Campbell's shoes respecting the employer's obligations under that agreement (*Caressant Care, supra*, at 1084). SCL, however, was not dealing just with one business. It is an inescapable fact that SCL bought two businesses, Campbell's and Select's, and that SCL carried on both of these businesses. Both businesses pre-existed the sale. The business attributes of each pre-existing business are present in SCL. That fact is not altered merely because SCL put the two businesses and their employees together in a single, integrated operation at the time of its purchase of each business. Campbell's business and employees came with all of the obligations, for SCL, of the collective agreement between the union and Campbell. Select's business and employees came without any collective bargaining obligations. In the result, SCL is faced with the practical problem of integrating two businesses, one under a collective agreement and the other "non-union", which appeared to the Board in *Caressant Care, supra*, paragraph 32 at 1084, to be the practical problem that "... prompted the Legislature to provide the relief contemplated by subsection 6."

33. Union counsel argues that there is no basis under section 63 on which the Board can deal with SCL's problem because there has been no intermingling within the meaning of subsection (6) on counsel's reading of it. Counsel reads the words "... where a business was sold to a person who carries on one or more other businesses ..." to require the purchaser itself to have carried on another business or other businesses *prior to* the section 63 sale. Were counsel's interpretation adopted here, it would have the effect of saying that Campbell's sale to SCL was not a sale "... to a person who carries on one or more other businesses ..." and, therefore, the integration of Campbell's and Select's businesses and employees coincident with SCL's acquisition of those businesses is not an intermingling of employees within the meaning of subsection (6). The Board disagrees. While the Board's decisions on which union counsel relies appear to support his reading of the subsection, that can be accounted for, at least in part, by the simple fact that, in each case, the purchaser had operated the non-union intermingled business *prior to* the section 63 sale. That does not mean that subsection (6) cannot and ought not be interpreted so as to include the facts of this application. SCL bought two existing businesses and, from the start of its operations after the sale, carried on both of them; albeit, they were integrated. Clearly, SCL is carrying on the businesses of both Campbell and Select, and in these circumstances, is "... a person who carries on one or more other businesses ..." within the meaning of subsection (6). Thus, having regard to the remedial purpose of subsection (6), the Board finds that when Campbell's business was sold to SCL, it was sold to "... a person who carries on one or more other businesses ...". That satisfies the first

requirement of the subsection. The second requirement is met by SCL having intermingled the two businesses and their employees on December 1st, the date of the sale. Therefore, the Board finds that the employees of R. V. Campbell Commercial Laundry Services (1985) Inc., a business covered by a collective agreement with Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 were intermingled with the employees of Select Commercial Laundries Inc. (the former employees of Select Laundry Limited) who were not covered by a collective agreement. Thus, having further regard to the purpose of subsection 63(6), its provisions can be and ought to be applied.

34. The Board has had the opportunity to consider the dissent of Board Member R. R. Montague. It is clear from the Board's decision that it agrees with him that section 63 obliged SCL to employ Campbell's former employees, but did not oblige SCL to employ Select's former employees. The fact is, however, SCL did employ Select's former employees, and did so simultaneously with its acquisition of all of the other attributes of Select's former business which SCL continued to operate. Then SCL integrated its "Select" business and employees with its "Campbell" business and employees. That makes the former Select employees different from employees which Select might have hired off the street. It also makes this case different from those Board cases, like *Antonacci, supra*, in which the Board has found that there has been no subsection (6) intermingling when a section 63 purchaser hires new employees and intermingles them with the employees who came with the purchased business.

35. The Board takes no issue with the analysis at paragraph 7 of the dissent of subsection 13(2) of the *Employment Standards Act*. However, as the Board reads that subsection as it applies to the former Select employees, it did not oblige SCL to hire them, but, having done so SCL is obliged to recognize their total period of employment with Select for purposes of their entitlement to public holidays, vacations, pregnancy leave, notice of termination and severance pay. See *Re Small and Equitable Management Ltd. et al*, (1990) 74 D.L.R. (4th) 422, a judgement of the Ontario Court (General Division), Divisional Court. That obligation might be viewed as another distinction between the former Select employees hired by SCL and employees which it might hire off the street.

36. The Board, having found that the provisions of subsection 63(6) ought to be applied in all of the circumstances of this application, and having accepted the parties' agreement that the taking of a representation vote would be the appropriate remedy if subsection (6) applied to the sale, directs that a representation vote be taken amongst all employees of Select Commercial Laundries Inc. of Metropolitan Toronto, save and except foremen, foreladies and persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

37. All those employed in the bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote.

38. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondents.

39. In summary, the Board has dismissed the application in File No. 0141-90-R for reasons given earlier in the decision and a representation vote has been directed in File No. 3033-89-R.

40. The application is referred to the Registrar for the conduct of the vote.

DECISION OF BOARD MEMBER RENE R. MONTAGUE; May 9, 1991

1. The facts of this case are simple and are laid out in the majority's decision. However, I feel the majority has missed the point in this case. Both R. V. Campbell Commercial Laundry Services (1985) Inc. ("Campbell") and Select Laundry Limited ("Select") ceased operations on November 30, 1989. As indicated at paragraph 9 of the majority's decision, Select "paid off all of their employees". Campbell also purported to have paid all of their employees. However, this is wrong in law as the Board has consistently ruled that when there is a sale of business, the predecessor employer has no right to lay off the employees unless in accordance with the collective agreement and the successor employer is bound not only by the collective agreement but is also the employer of the former employees of the predecessor. Secondly, I believe that the Board, because of a delay since the hearing of July 9, 1990 till May, 1991 to issue a decision is a denial of natural justice and has seriously prejudiced the trade union as it does not have *a hope in hell* of winning a vote as the majority has ordered. This is a clear case, in my opinion, of justice delayed is justice denied that has sadly been caused by the Board in its unconscionable delay of issuing a decision.

2. Jurisprudence regarding the obligation of a purchasing employer is scant but clear.

3. In *Emrick Plastics*, [1982] OLRB Rep. June 861 at paragraph 17, the Board stated:

... Collective bargaining legislation is designed primarily for the benefit of employees, not trade unions. Can it really be said that the Legislature in enacting section 63 of our own Act intended that the rights of the bargaining agent selected by the employees would "run with the business" ..., that the collective agreement bargained for and ratified by those employees would run with the business, but that the very employees who had made these choices would not? The Board would need unmistakable language in its statute to come to that conclusion. ...

At paragraph 18, the Board was clear:

We conclude, similar to the British Columbia Labour Relations Board, that section 63(2) of our own Act continues the effect of a collective agreement over a sale transaction **without hiatus**, and that the purchaser stands literally in the shoes of its predecessor with respect to any rights or obligations under that agreement. The purchaser, in other words is given no opportunity to "weed out undesirable employees" contrary to the provisions of the collective agreement, nor to decline to recognize any of the seniority or other rights accrued by employees under the collective agreement during their tenure with the predecessor employer. We agree with counsel for the respondent that the purchaser takes the business exactly as he receives it from the vendor. Even if, for example, employees have been given notice of termination by the vendor, the purchaser is no more entitled to start that business up without regard to recall rights of employees under the collective agreement than the vendor would have been. The obligations of neither employer are determined by whether the employer on its own chose to treat a severance at a given point in time as a termination or lay-off.

4. *Emrick* was followed in *Daynes Health Care Limited*, [1984] OLRB Rep. Aug. 1091. This was a follow-up case to *Riverview*, *supra*, as the successor employer did not employ the employees of the predecessor. At paragraph 35, the Board stated:

When Daynes acquired the business, it stood precisely in the shoes of its predecessor. It inherited an established complement of employees with established contractual rights. Some of these employees were on layoff and had recall rights which they could assert before there could be any new hires. More importantly, there was a much larger group of employees who had been actively employed right up to the date of the sale. Those employees were not, and could not have been, terminated without just cause-which cause could not be based solely on the impending sale. Nor could they be "laid off" from their jobs when those jobs and their work continued. If it were otherwise, the purpose and intended effect of section 63 would be substantially undermined. ...

At paragraph 38, the Board specifically found that the employees of the predecessor employer were employees of the successor employer.

5. In *Caressant Care, supra*, [1984] OLRB Rep. Aug. 1060, at paragraph 34, the Board stated:

... the Board's declaration of a "sale" of the Willson beds means that Caressant Care was obliged to offer to continue the employment of "Willson" employees in accordance with the terms of that collective agreement, as the Board noted in *Bermay*. ... To the same effect, see *Emrick*. ...

6. As indicated at paragraph 12 of the majority's decision, the parties are agreed that Campbell was sold to SCL. Accordingly, on December 1, 1989 when SCL commenced operations, by operation of section 63(2) of the *Labour Relations Act* SCL had as its employees those of the predecessor Campbell. The employees of Select had *no status at all* under the Act, especially section 63. They were non-union and therefore their employment relationship was covered by the common law and the *Employment Standards Act*. As indicated in paragraph 9 of the majority's decision, Select ceased operating and "paid off" their employees. When SCL hired the former employees of Select they were in no better position than employees hired off the street for purposes of the *Labour Relations Act*.

7. The *Employment Standards Act*, section 13(2) states:

Where an employer sells his business to a purchaser who employs an employee of the employer, the employment of the employee shall not be terminated by the sale, and the period of employment of the employee with the employer shall be deemed to have been employment with the purchaser for the purposes of Parts VII, VIII, XI and XII.

[emphasis added]

Nowhere does it state the period of employment of employees shall be deemed to have been employment for the purposes of the *Labour Relations Act*. As the majority notes, Parts VII, VIII, XI and XII covers "Public Holidays", "Vacation With Pay", "Pregnancy Leave" and "Termination of Employment" respectively. Nothing in these Parts provides rights under the *Labour Relations Act*. Further, the evidence before this panel was that the employees were terminated by Select. Consequently, the *Employment Standards Act* is irrelevant to this case.

8. In order for section 63(6) of the Act to come into effect, two factors must be present:

- (1) a business must be sold to a person who carries on one or more businesses where there is a bargaining unit in one of the businesses; and
- (2) the purchaser must "intermingle" the employees of one of the businesses with those of another business.

9. As I have indicated in paragraph 6, for purposes of the Act the employees of Select ceased being employees on November 30, 1989. These individuals were then hired by SCL which was, by virtue of the Act, a unionized employer. They were terminated by one employer and hired by another employer: that is not intermingling, that is expansion of the workplace by a unionized employer. There were no employees of another business to intermingle because Select ceased operations and terminated its employees. That is the evidence.

10. The majority at paragraph 32 of its decision states:

... Select's business and employees came without any collective bargaining obligations ...

Both the evidence and the law beg to differ. Select's business came without any collective bargaining obligations and without any employees.

11. It is for these reasons that there cannot be intermingling as per section 63(6) when there was a sale of a business from a unionized employer to an employer with no incumbent employees and the successor employer hires new employees. It is admirable that the majority wishes to grant legal rights which arise out of unionization and the *Labour Relations Act* to non-union employees. However, there is no legislative authority to do so. When a non-union employer terminates its employees and sells the business, the only rights those employees have, if they are hired by the purchasers, are those enumerated in the *Employment Standards Act*. It is not admirable, indeed it is preposterous and beyond the Board's jurisdiction, to apply to non-unionized employees a collective bargaining concept and then to use that application to defeat the collective bargaining relationship.

3360-90-R Hotel, Motel and Restaurant Employees Union Local 442, Applicant v. Sheraton Fallsview Hotel and Conference Centre, Respondent

Certification - Practice and Procedure - Union filing 3 certification applications within 4 month period - Board allowing union to withdraw 2 applications - After meeting with Labour Relations Officer in connection with third certification application, union seeking leave to withdraw - Having regard to the stage of proceedings when request made, Board dismissing application - Dismissal occurring in circumstances where wishes of employees not been tested - Board declining employer request to bar further certification applications by union for 6 months

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *W. H. Wightman* and *C. McDonald*.

DECISION OF THE BOARD; May 9, 1991

1. This is an application for certification.

2. The applicant requested that a pre-hearing representation vote be taken. As is the Board's usual practice the parties met with a Labour Relations Officer in order to make arrangements for the holding of the vote. At that time the applicant sought leave to withdraw its application. Having regard to the stage of the proceedings when the request was made, this application is hereby dismissed.

3. Following the meeting with the Labour Relations Officer the Board received a letter from counsel for the respondent dated April 5, 1991, requesting that the Board not only dismiss the applications but also impose a bar on the applicant, prohibiting it from filing any further certification application for a period of at least six months. The respondent relies on the following facts. This is the third application for certification made by the applicant within a period of four months. The application in Board File No. 2428-90-R was filed December 12, 1990. The Board allowed leave to withdraw that application by decision dated December 21, 1990. The second application was filed February 26, 1991 (Board File No. 3125-90-R), and leave to withdraw that application was granted by decision dated March 12, 1991. This application was filed March 14, 1991. In each case the respondent has filed a reply and the required documentation including a list of employees in the proposed bargaining unit.

4. The letter of April 5, 1991 was forwarded to the applicant by the Registrar requesting its comments on or before May 1, 1991. No response has been received by the Board.

5. In the circumstances we are not persuaded that it is appropriate to impose a bar. The Board's approach to the exercise of its powers under section 103(2)(i) was fully canvassed in *Amarcord Carpenters Limited*, [1989] OLRB Rep. June 531 and the cases cited therein:

...

5. Under clause 103(2)(i) of the Act, the Board has the power

to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

The Board's approach to the exercise of its powers under this clause was described in general terms in *Repac Construction and Material Limited*, [1978] OLRB Rep. Jan. 91, at paragraph 7:

As a general principle the Board is quite reluctant to either bar, or refuse to entertain, a subsequent application for certification filed by a previously unsuccessful applicant. Indeed, such action is usually only taken either where employee desires have been tested by a representation vote in which the union failed to receive sufficient support to be certified (See: *Campbell Soup Company Ltd.*, 1976] OLRB Rep. Feb. 1091), or where the union has sought to avoid an unfavourable vote result by withdrawing its application following the ordering of such a vote. (See: *Mathias Ouellette* 56 CLLC ¶18,026). Exceptional circumstances may, however, also lead to the Board invoking the provisions of section 92(2)(i) [now 103(2)(i)] in other situations. The leading example of this is the *J. W. Crooks Company* case, [1972] OLRB Rep. Feb. 126, where "in light of the special and extreme circumstances confronting the Board", namely four unsuccessful applications for certification made by the same applicant in a little over three months, the Board imposed a six month bar on any future applications by the same applicant. In its consideration of any request pursuant to section 92(2)(i), the Board, concerned that the wishes of employees be given effect to, has always been careful not to use its authority under that section merely to punish an unsuccessful applicant union, even in those instances where the union may have engaged in previous irregular or improper conduct. (See *Fruehauf Trailer Company of Canada Limited* [1974] OLRB Rep. Jan. 6).

The rationale for imposing a bar was explained this way in *General Freezer Limited*, 63 CLLC ¶16,294:

A bar to future applications for certification is usually imposed following a dismissal after a representation vote is taken, due to the fact that in such cases, all of the employees in the bargaining unit have had the opportunity to express their wishes with respect to their choice of a bargaining agent by means of a secret ballot, and therefore the true wishes of the employees have been fully tested. It is not the Board's usual practice to impose a bar to future applications for certification where an applicant fails to submit sufficient evidence of membership to entitle it to a representation vote where there is no incumbent bargaining agent. The success of an applicant union's organization campaign is dependent on many factors and its failure to acquire sufficient membership has not the same evidentiary value with respect to the wishes of the employees as a representation vote.

...

6. While this is the third application filed, it is the first application to be dismissed by the

Board. That dismissal occurs in circumstances where the wishes of the employees have not yet been tested. These circumstances are distinguishable from the kind referred to in *J. W. Crooks Company*.

7. As set out in paragraph 1, this application is hereby dismissed.

2423-90-EP Alan G. Marshall, Complainant, v. Varnicolor Chemical Ltd., Respondent

Discharge - *Environmental Protection Act* - Remedies - Employer in business of re-cycling or disposing of chemical waste - Complainant concerned about employer's disposal methods and approaching local environmental group, as well as local media - Complainant suspended with pay and subsequently laid off - Board finding that lay off and subsequent failure to recall motivated by complainant's activities in seeking enforcement of *Environmental Protection Act* - Board making no order as to reinstatement due to closure of employer's business - Board prepared to reconsider matter should employer's operation re-open - Compensation ordered and Board remaining seized

BEFORE: *M. G. Mitchnick*, Chair, and Board Members *J. A. Ronson* and *E. G. Theobald*.

APPEARANCES: *G. E. Oldfield* and *A. Marshall* for the complainant; *David C. Daniels* and *Severin Argentin* for the respondent.

DECISION OF THE BOARD; May 30, 1991

1. This is a complaint filed by Alan Marshall, alleging that he has been terminated from his employment with the respondent Varnicolor Chemical Ltd. contrary to the provisions of section 134b of the *Environmental Protection Act*. Section 134b provides in its material parts:

134b.-(1) In this section, "Board" means the Ontario Labour Relations Board.

(2) No employer shall,

- (a) dismiss an employee;
- (b) discipline an employee;
- (c) penalize an employee; or
- (d) coerce or intimidate or attempt to coerce or intimidate an employee,

because the employee has complied or may comply with,

- (e) the *Environmental Assessment Act*;
- (f) the *Environmental Protection Act*;
- (g) the *Fisheries Act* (Canada);
- (h) the *Ontario Water Resources Act*; or

- (i) the *Pesticides Act*,

or a regulation under one of those Acts or an order, term or condition, certificate of approval, licence, permit or direction under one of those Acts or because the employee has sought or may seek the enforcement of one of those Acts or a regulation under one of those Acts or has given or may give information to the Ministry or a provincial officer or has been or may be called upon to testify in a proceeding related to one of those Acts or a regulation under one of those Acts.

(3) A person complaining of a contravention of subsection (2) may file the complaint in writing with the Board.

• • •

(6) Where a labour relations officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint.

(7) Where the Board inquires into the complaint and is satisfied that an employer has contravened subsection (2), the Board shall determine what, if anything, the employer shall do or refrain from doing with respect thereto.

(8) A determination under subsection (7) may include, but is not limited to, one or more of,

- (a) an order directing the employer to cease doing the act or acts complained of;
- (b) an order directing the employer to rectify the act or acts complained of; or
- (c) an order directing the employer to reinstate in employment the complainant, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer.

• • •

(10) *On an inquiry under this section, the burden of proof that an employer did not contravene subsection (2) lies upon the employer.*

• • •

(15) For the purposes of subsections (2) to (14), an act mentioned in subsection (2) that is performed on behalf of an employer shall be deemed to be the act of the employer.

The respondent in the course of the hearing and in final argument has addressed certain arguments to the Board on the application of the rule in *Browne v. Dunn* to this case. The Board is satisfied, however, that the order of the calling of evidence in this matter provided the respondent with the opportunity to adduce rebuttal evidence if necessary on matters not put to the respondent's witnesses in chief, and that any inferences which might be drawn from the failure of the complainant to challenge the respondents' witnesses at the first opportunity are more than counter-balanced by the inferences the Board is compelled to draw from the evidence before it as a whole.

2. The respondent is located in the town of Elmira, Ontario, and is (or was) in the business of re-cycling or disposing of chemical waste. Included in the respondent's premises are a distiller ("still"), lab, and maintenance department, together with a large "yard" area, where barrels of waste are handled as well as temporarily stored, and certain of the respondent's operations are carried out. The complainant was hired in November of 1988 to do "general yard duties", which includes assisting in the loading and unloading of trucks and tankers, and working in the waste-derived fuel area. For the first four or five months of the complainant's employment it was to "gen-

eral yard duties'' that the complainant was assigned. The respondent notes a difference in the parties' evidence as to the extent to which the complainant in that period would have been called upon to work in the waste-derived fuel area. That difference is not in any event significant to the Board's decision, however, since the evidence of Mr. Clausung, the Production (and Yard) foreman, is that the job in question can readily be learned and performed by anyone who is mechanically-inclined, along with perhaps a little amount of knowledge of the types of paints and waste that Varnicolor normally handles. It is also common ground in the evidence that following that initial four or five-month period the primary job to which the complainant was assigned for the remaining year or so of his employment was the 'single-incumbent job of preparing dry landfill for delivery to the Regional landfill site.

3. Before proceeding any further it should be noted that the parties agreed to focus and expedite these proceedings by placing before the Board the following statement of fact from the respondent:

1. The respondent would not have dismissed the complainant on April 6, 1990 in the absence of what it contends was a layoff. So if the Board finds that there was a dismissal, we agree it was a dismissal without just cause.
2. We agree that we were aware as of February 9, 1990 that the complainant approached an organization called APTE (Assuring Protection of Tomorrow's Environment), a citizen's group based in Elmira, and approached the local media with the subjective objective of seeking the enforcement of the *Environmental Protection Act*.
3. The respondent agrees that the Ministry of the Environment consulted APTE in the course of its investigation of Varnicolor.
4. We agree that the Ministry of the Environment became aware of media coverage of these issues generated by the complainant ...

The foregoing facts, it may be noted, were stipulated before the Board to expedite consideration of the respondent's argument that the protection against recrimination under section 134b of the *Environmental Protection Act* applies only to employees seeking the enforcement of the Act *directly* through the Ministry of the Environment. The Board ruled that there was nothing in the language of section 134b to so limit its application.

4. The parties then followed with the calling of their *viva voce* evidence. The complainant testified that he gradually over the course of his employment was becoming increasingly concerned about the methods used by his employer in carrying out the disposal duties provided by its Certificate of Approval, both in terms of the number of accidental spills, and also the manner in which he believed some of the liquid wastes were being deliberately disposed of. Toward the end of 1989 he began anonymously raising those concerns with the local office of the Ministry of the Environment, but became disturbed at what he felt was the lack of any concrete action on the part of the authorities. There is evidence of a further "media event" involving the respondent and initiated by the complainant on January 25th, 1990, but the most significant action taken by the complainant occurred in the early part of February. On February 8th he attended for the first time a meeting of the aforesaid local environmental-action group, and laid out a number of his concerns. From there he met into the early-morning hours with an officer from the Cambridge Abatement Office, outlining his "charges" in some detail while sitting in the motor vehicle of the officer. On February 9th the complainant completed his full shift, apparently without incident, and without publicity. At some point on that same day he attempted to assist members of A.P.T.E. to gain unauthorized entry to the respondent's premises for the purpose of gathering photographic evidence. From that date the evidence has presented the Board with a very limited picture of what was occurring, but it appears that the activities of the respondent quickly achieved new heights of prominence with both

the Ministry and the local media - as did the complainant's role in generating this new interest. The company at that point apparently was talking to its lawyer (who was not the lawyer appearing before the Board) and the complainant was talking to his, and the culmination was that the following letter from the company was delivered to the complainant in the early part of his next shift, February 12th, advising the complainant effectively that he was being suspended with pay:

Dear Alan:

After conversing with Mr. Oldfield we wish to advise you that you are free to go home until we can arrange for an interview.

This is to confirm that you continue to be an employee of Varnicolor Chemical Limited and that you will receive full pay and benefits during your time away from the premises. We will of course work through your solicitor to arrange an interview as quickly as possible.

Yours truly,

"W. Kowalchuk"

W. Kowalchuk

5. By this time, as indicated, the complainant had indeed "gone public", including enlisting the support of the (then) Opposition NDP, and on February 15th, with community attention and the media focussed all around him, the respondent's president and owner, Mr. Severin Argentin, wrote to (then) Environment critic Ruth Grier as follows:

Dear Mrs. Grier:

I feel that you and your staff have been taken in by Alan Marshall and as a result have caused the Varnicolor Chemical Limited great harm. The twenty or so loyal, concerned and working employees do not share Mr. Marshall's concerns. Indeed, the company gave Mr. Marshall time at home with full pay and benefits because it could not guarantee his well being in the plant once he's publicly accused Varnicolor of wrong doing.

Mr. Marshall's future is in the hands of our attorneys. His persistent attacks, always geared to obtain publicity, do make it doubtful that he can come back to work...

By this time as well Mr. Argentin and the respondent had become the focus of attention of the administrators of the Region of Waterloo's landfill site, the destination of the materials that it had been the complainant's job to prepare for disposal, and the Region indicated to Mr. Argentin that it was not willing to receive any further material from the respondent unless the respondent could satisfy it that it was abiding by new stringent testing conditions. Mr. Argentin testified that these new conditions would be extremely expensive and uneconomical for the respondent, and that he was having ongoing discussions with the site's administrators in an effort to have them adopt a more moderate position. Those efforts to persuade the Region failed to bear fruit, however, and by mid-March, according to Mr. Argentin's own evidence, the Region advised Mr. Argentin that they were no longer prepared to accept material from the respondent for disposal. The evidence indicates that the waste materials involved continued throughout this period and thereafter to be disposed of by the respondent, by being checked and loaded in their original drums onto trucks bound for disposal sites in the U.S.A. But the respondent's evidence also is uncontradicted that by far the bulk of the job that the complainant had been performing, the splitting and emptying of drums into a bin, no longer existed.

6. In the meantime investigation by the Abatement Office of the charges levied by the complainant against the respondent with respect to spills and the dumping of wastes into the public

sewer system continued. Finally, at a meeting which on the evidence took place somewhere between March 30th and April 3rd, the District Officer for that Cambridge Abatement Office, David Ireland, advised Mr. Argentin that the office had completed its investigation of the specific charges, and had found no evidence which would warrant further action on them. Mr. Argentin's own description of that meeting was that the Ministry made it clear that the respondent was "totally absolved of any wrongdoing", with the exception of a "paper violation" with respect to taking too long to dispose of some of its waste inventory stored on the premises. Mr. Ireland, on the other hand testified that at the meeting he had indicated that audit procedures undertaken by his branch of the respondent's full operation would be continuing (and in fact those further activities led to a 20-part Control Order being issued against the respondent on December 21st by the Director of the Branch.) As of this meeting, however, the evidence of Mr. Argentin is that he thought that the matter was essentially over. On April 6th the complainant was sent a letter by the respondent's lawyer effectively terminating the complainant's employment, in the following terms:

Messrs. Allan Marshall
and Edward Oldfield
c/o Messrs. Hobson, Wellhauser et al.
Barristers & Solicitors
P. O. Box 580
172 King Street South
Waterloo, Ontario
N2J 4B8

Gentlemen:

RE: Varnicolor Chemical Ltd. v. Allan Marshall

As you are aware, the writer acts on behalf of Varnicolor Chemical Ltd.

This letter is to advise you that I have been instructed by Varnicolor Chemical Ltd. to advise that Mr. Allan Marshall is being laid off effective the 6th day of April, 1990; as the work that Mr. Allan Marshall was doing is no longer available.

The following is enclosed herewith:

1. Record of Employment number R98109803;
2. Holiday pay in sealed envelope from my client's accountants, Malcolm, Gilson & Co., which includes all payments up to and including April 6, 1990;
3. Paycheque in sealed envelope from my client's accountants, Malcolm, Gilson & Co., which includes all monies owing up to and including April 6, 1990.

Yours very truly,
SIDNEY S. BERGSTEIN, Q.C.

Per _____

The "Record of Employment" completed by the company and referred to in the letter bore the indication "Not Returning". Asked about that in his cross-examination, Mr. Argentin testified that that was a "slip", and that if the landfill site were to once again permit the respondent to deliver its material to it for disposal, there was every possibility that the complainant would be re-employed by the respondent.

7. As for the complainant, while the evidence once again is sketchy, it appears that he con-

tinued to carry on his public “crusade” against the respondent, attempting at the same time to obtain information as to how to go about bringing a complaint for what he believed to be the termination of his employment as a result of his having sought the enforcement of the Act. He did, however, manage to obtain employment with the Waterloo Public Works Department as of April 30th, and it was only after that ended on October 16th that the matter of obtaining redress with the respondent took on greater urgency. The complainant did finally obtain the necessary papers to file the instant complaint on December 6th, 1990, claiming the following:

1. Full wages from the time of my dismissal Fri. April 6, 1990 until I was able to obtain seasonal employment on Mon. April 30, 1990.
2. As I have been unable to obtain permanent full time employment since my dismissal by Varnicolor and am currently unemployed (since Oct. 16/90) I would like full wages from Oct. 16/90 until I am again able to obtain full time employment.
3. As the main purpose of E.P.A. 134(b) is to protect an employees job I would like the Board to order Varnicolor Chemical to rehire me at full pay and benefits and with all of my seniority (vacation pay etc.) intact.
4. Finally I believe that some punitive damages are in order due to a) Varnicolor's contempt of the Minister of the Environment by dismissing me 3 days after Mr. Bradley said my job was protected.

The respondent in defending the complaint states in the main that:

“The Respondent’s actions were in no way tainted by resentment toward the Complainant for his activities in pursuit of environmental concerns or by the concern that he would engage in similar future activities.”

Mr. Argentin in fact testified that he bears “no malice” toward the complainant. We have, however, already seen the letter that Mr. Argentin wrote to Ruth Grier in February. Defending himself against the various charges made by the complainant, Mr. Argentin in a further letter to Mrs. Grier in June asks: “has it ever occurred to anyone that he may simply be a vicious crank trying to destroy me?”. And again, in an August letter to customers and suppliers, Mr. Argentin writes: “My problems arise from a single employee...”, a reference, Mr. Argentin acknowledges, to the complainant. That sentiment would certainly appear to be evident in the action of the respondent on February 12th of rushing the complainant out of the workplace as the whole matter broke with the Ministry and the media, and paying him to stay away until the point when Mr. Argentin says he believes the Ministry’s investigation was essentially completed - at which point the complainant’s relationship with the respondent was permanently severed. The reason for that lengthy “suspension with pay” is variously described by the respondent throughout the evidence and submissions as being “on the advice of its lawyer”, “for the safety of the complainant”, out of a concern that the complainant’s presence might produce “more inadvertent spills or little accidents”, or, finally, “for administrative reasons”.

8. As for the decision to “lay the complainant off” on April 6th, the respondent points to the fact that by then the Region had issued its ultimate decision not to receive any more material from the respondent at *all*, and that at that point it became clear therefore that there would be no further work for the complainant. But that decision was announced in mid-March, so that if *that* was the driving force behind the decision to cut the complainant adrift, there would appear to have been no reason to wait an additional 3-4 weeks to do so. The only other intervening event beyond that announcement by the Region was the meeting with the Abatement Branch at which Mr. Argentin understood he had, in his words, been “totally absolved”.

9. From a broader perspective, the respondent also raises in support of its action to let the complainant go what it says was a generally lazy and uncooperative attitude on the part of the complainant. But the only documentation of any problem with the complainant's work generally is a single letter of reprimand for a barrel spill in September of 1989. And against that is the undisputed fact that the complainant received three raises from the respondent in 1989, and a net bonus of \$1,000 (which the complainant testified was higher than the Lab Manager's, and for which he personally thanked Mr. Argentin). And it is not as though, on the evidence, the respondent does not have a record of high turn-over and ready firings. On all of the evidence, therefore, the Board is not satisfied that any problems with either the complainant's work or his attitude would have been sufficient to make the respondent unwilling to have him as an employee, barring the "other" activities that are the subject matter of this complaint.

10. On the other hand, the question of remedy is a little more difficult. Counsel for the complainant in his written argument requests that the Board "recall the parties to provide evidence regarding the issue of an appropriate remedy and damages", but beyond the obvious issue of quantum, it is not clear what it is the complainant thought it was that was left aside pending further evidence. The evidence recounts in detail that as of the date of the complainant's April lay-off, there were in addition to Mr. Clausing, the foreman, four individuals employed in the Production area, and having the following seniority in comparison to the complainant's year and a half:

Doug Claggs	Still operator	5 years
Wayne Walker	Still operator	1 year
Steve Wigg	Waste-derived fuel	1 year
Bob Elliott	Waste-derived fuel	6 or 8 months

There is, however, no collective agreement here and no practice of laying employees off by "seniority". The complainant himself had been employed for only a year and a half or so, and for the last year of that the job he had been given the exclusive assignment for was the splitting of drums and collection of their contents for delivery to the landfill site. When that job disappeared, the evidence would not in any way suggest that the response of the employer would have been to assign an employee in the complainant's position to "bump" another of the current employees off the job they had been doing in the "still" area, or even off the lesser-skilled job in waste-derived fuel. The real problem arises for the respondent at the point when some of those existing employees had left, and the respondent chose to replace them from "off the street", rather than recall the complainant. There were three such persons temporarily hired to do the waste-derived fuel job, all while on strike at nearby Uniroyal, from the evidence of Mr. Clausing in approximately May, September, and then October. Mr. Argentin explained in his evidence that these individuals were hired because of their special skills. But Mr. Clausing's testimony, again, was essentially that no special skills were actually needed - apart from a knowledge of the respondent's materials, which certainly the complainant would have over any outsider. Then Mr. Argentin variously says that the complainant was not considered simply because no one would work with him, or because the job was 'very dirty', and the complainant did not like to work that close to the chemicals. We have considered such evidence from Mr. Argentin, but once again the Board is persuaded on all of the evidence that the complainant in the main was not considered for yard-replacement when the need subsequently arose because there was no possibility that the respondent was going to have him back on its premises, given his activities in seeking the enforcement of the *Environmental Protection Act* and related legislation. And that is precisely the kind of employer reaction that section 134b of that Act is designed to provide protection against.

11. The operation of the respondent is now closed - at least pending the result of any appeal of the control order issued against it. The Board accordingly makes no order as to the reinstatement.

ment or re-hiring of the complainant at this time. The Board is prepared to reconsider that matter, however, should the respondent's operation re-open subsequently, upon being requested by the complainant in a timely way to do so. The claimant is also not claiming compensation for the period during which he was employed with the City of Waterloo, following his severance by the respondent. For the reasons given above, however, it is the view of the Board that the claimant is entitled to compensation for any periods other than that during which the respondent had anyone other than Messrs. Claggs, Walker, Wigg or Elliott working in its yard, up to the time of the respondent's closure.

12. The Board will remain seized of this matter in the event the parties are unable to resolve the issue of compensation on that basis.

3248-90-OH Wade Dennis Procter, Complainant v. Whitler Industries Limited, Respondent

Health and Safety - Complainant sent home and then laid off after engaging in work refusal - Board finding that complainant had reason to believe that situation in workplace likely to endanger himself - Employer offering three different reasons for lay-off - Employer not discharging onus of showing that lay-off not motivated, even in part, by complainant seeking to exercise rights under *Occupational Health and Safety Act* - Complaint allowed - Reinstatement with compensation ordered

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *R. W. Pirrie* and *R. R. Montague*.

APPEARANCES: *Linda Vannucci-Santini* and *Wade Procter* for the complainant; *R. N. Parker* for the respondent.

DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER R. R. MONTAGUE: May 3, 1991

1. The name of the respondent is amended to read; "Whitler Industries Limited".
2. This is a complaint under the *Occupational Health and Safety Act* ("the OHSA") to the effect that Mr. Procter was laid off because of his compliance with the OHSA or his attempts to enforce it. The employer responds that his health and safety activity was no part of the reason for the lay-off.

The Facts

3. Rod Parker, the owner of the respondent company, gave evidence on behalf of the employer. Wade Procter, the complainant, and his coworkers, Roger Kennedy and Brian Bird, gave evidence on behalf of the complainant. The relevant facts are summarized below.
4. The respondent operates a small wood-working shop in Peterborough, Ontario, where kitchen cabinets and counters are manufactured and assembled for home installation. There were approximately eight employees in the wood-working shop at the time of Mr. Procter's lay-off. Starting early in February, due to a planned business expansion, the company advertised for new

employees. The employer planned to upgrade both its machinery and the skills of its employees. Mr. Parker testified that these plans required the reorganization of the plant which made the jobs of Mr. Procter and Mr. Bird redundant. He was intending to reallocate people from jobs in the assembly and finishing areas of the wood-working plant to the table-saw area where Mr. Procter had regularly worked.

5. Mr. Parker testified that he reviewed the seniority list because he tries to abide by the seniority list, although not being bound to a collective agreement, he is not obligated to do so. He applied what he called a weighted seniority and experience factor. There was no evidence of the qualifications of the junior employees retained compared to Mr. Procter, other than their assigned tasks at Whitler. He noted that there were three people with dates of hire around September 1990, all with more than three months but less than six months experience. He said that on reviewing his requirements and the new equipment he found that at least two of the junior employees would have to be terminated by way of lay-off. He says that he chose Mr. Procter and Mr. Bird prior to February 11, because they had no exposure outside of what Mr. Parker called section 1. This is the area in which the components are cut on the saw. He hired three new employees to start February 18. The evidence indicated the resumés for these employees were received prior to February 11, but did not indicate when they were accepted for employment.

6. Mr. Procter started work with the respondent on September, 1990. He was laid-off on February 11, 1991, his first day back from a month long absence on Workers' Compensation benefits. Prior to February 11, Mr. Procter had not received any complaints about his work and received a standard raise after his first month. The employer made no issue of his work record. Mr. Procter recounted an incident from December 1990 where he had repaired some equipment, saving the employer expense. When speaking to the plant manager, Mr. Dalahay, about this, Mr. Dalahay indicated that if it came time to lay people off, it would be people who did things like that who would stay. Mr. Kennedy, a cabinet maker with 18 years experience, found Mr. Procter to be an excellent worker who was concerned for others' safety as well as his own.

7. From early on in Mr. Procter's employment he had taken an active interest in the state of safety and cleanliness of the wood-working shop. For example, he spent considerable time organizing and cleaning up his area of the shop. It was his testimony that the shop was generally in a very unsafe state for operating table saws. As well, he said flammable material and chemicals were stored near sawdust and wood supplies. He had on a number of occasions approached his foreman, the plant manager and Mr. Parker about his concerns, which included, among others, failure to use safety guards on the table saws, sufficient clutter of debris that the saws were unable to operate properly and the employees were unable to move around freely, and failure to provide safety glasses and dust masks. When Mr. Procter spoke to the employee health and safety representative about these matters he was told to "smart up or Rod would fire [him]". Mr. Parker, for his part, had thanked Mr. Procter when he raised these matters and told him something would be done about them. Mr. Procter agreed that Mr. Parker had never taken offence to his suggestions, but testified that action was not taken as promised. Mr. Parker testified that he had been informed that all necessary action had been taken.

8. Mr. Procter's absence on WCB was due to losing the top of a finger when Mr. Procter was closing an outside door to the plant dust collecting system. The door, which is quite heavy, smashed his finger before he could get it out of the way. The latch on the door did not work correctly and from time to time the door would open, creating a negative pressure in the vacuum system which caused dust to blow back into the plant. It was therefore necessary for an employee faced with this problem to go close the door. It was Mr. Procter's position that the accident could have been prevented if the door to the exhaust system had had a properly working latch. It is the

employer's position that the accident could have been prevented if Mr. Procter had turned off the power to the system before closing the door and that therefore it was unnecessary to repair the latch on the door, as Mr. Procter wished. Mr. Parker maintained that all employees were trained on the proper use of the door to the dust collecting system and that they should cut off the power before doing so. Mr. Procter said he received no training whatsoever and was not aware of any employee receiving any safety training.

9. On his return to work from compensation on February 11, Mr. Procter was handed a list of work which would take a number of days to complete. He found his area in a state of untidiness such that the saw bed would not extend fully because of debris in the way. Shortly after commencing work on his saw, he had the same problem with the dust collector set out above, which required him to close the door which had injured him a month earlier. He felt fear that he would injure himself, and was generally upset that the work that he had put into organizing and cleaning his work area was completely undone in his month-long absence. Furthermore, the fact that the door that injured him had not been repaired was of serious concern to him.

10. Mr. Procter went to talk to his coworker Roger Kennedy, who tried to calm him down and suggested that he speak to Mr. Brian Dalahay, the Plant Manager. Mr. Procter did so. Mr. Procter asked Mr. Dalahay why the door had not been taken care of. Mr. Dalahay "hollered" that it was none of his business and that it would be taken care of when they decided to. Messrs. Bird and Kennedy heard a commotion but could not make out the words. Mr. Procter frankly admitted that he then lost his temper and "threatened" Mr. Dalahay with health and safety authorities if he did not fix things in the plant and refused to work because of the state of his work area. Mr. Dalahay left and came back and said that he had been talking to Mr. Parker, the owner, and told Mr. Procter to go home and come back the next day to discuss it. Mr. Parker testified that Mr. Dalahay told him that Mr. Procter was out of control and did not want to work and that he was unhappy about safety. No mention of the *Occupational Health and Safety Act* or of any intention to investigate was made by Mr. Dalahay or anyone else in management.

11. Mr. Procter went from work to what he called the Health and Safety Labour Board in Peterborough and was told that they would not send anyone into the workplace at that time for fear of his being fired. Instead, the person to whom Mr. Procter spoke gave him suggestions on how to deal with the situation himself. Mr. Procter went home about 1:30 in the afternoon and received a phone call the same afternoon from Mr. Dalahay who said he was terminated. Mr. Procter was not sure of the meaning of that so he phoned the health and safety official and was told to phone the employer back and ask what he meant. He did so. Mr. Dalahay put him on hold for about five minutes and came back and said "You're laid off. You can come in and pick up your separation papers on Friday." Mr. Procter phoned the health and safety official once again and was told it was now a matter for the Labour Board.

12. Mr. Parker testified that he talked to Mr. Dalahay later in the day and he discussed with him whether there was anything else to be dealt with about Mr. Procter. Mr. Dalahay said "no" that Mr. Procter had gone home and that he would get in touch in a few days and mentioned that Mr. Procter was unhappy about the safety conditions in his area. Roger Kennedy testified that at some point in the afternoon Mr. Dalahay came over to his work area, seemed upset, and said, "Wade's out of here; I fired him," and added the comment "The place is not that bad a mess." Mr. Kennedy replied, "I've seen worse." Mr. Parker testified that Mr. Dalahay had denied saying Mr. Procter was fired and testified that Mr. Dalahay does not have the authority to fire anyone. We have no evidence from Mr. Dalahay.

13. When Mr. Procter went in to pick up his papers, they were not ready. Mr. Procter met

with Mr. Parker, asked for his job back, and discussed health and safety matters. Mr. Parker's opinion was that things were not unsafe and Mr. Procter expressed his views that they were. Mr. Procter said he was willing to compromise and would disregard his health and safety concerns if he could get his job back. Mr. Parker said he would discuss that with Mr. Procter's foreman. Mr. Parker maintains what he was going to talk to the foreman about was when Mr. Procter would be terminated, not if he would be terminated. When Mr. Parker got back to Mr. Procter as a result of this conversation, it is Mr. Procter's uncontradicted evidence that Mr. Parker said he was being laid off not because of his work habits or because of health and safety but because of his temper. The evidence does not indicate that reorganization and/or job redundancy were ever mentioned to Mr. Procter.

14. The record of employment issued to Mr. Procter on February 18 was originally issued with no indication of the reason for lay-off on it. It was filled in later the same day with the code for shortage of work, after the Unemployment Insurance Commission pointed out to Mr. Procter that the space on the form calling for a reason was blank. Mr. Parker outlined that by shortage of work the company meant redundancy caused by the reorganization. Mr. Procter was paid up until February 16.

15. Neither Mr. Bird nor Mr. Procter heard anything about the planned lay-off until the day on which they were laid off. Mr. Bird was fired on March 12 because, Mr. Parker testified, of his work ethic and attendance. Mr. Parker made a point of saying that although he could have put down that he was just laid-off he felt that he should be put the actual reason why he was discharged regardless of what benefits Mr. Bird might receive as a result.

16. Mr. Parker testified that health and safety matters were no part of his consideration in the decision to lay off Mr. Procter. As proof of his concern for health and safety he offered the company's meritorious workers' compensation accident experience record and a voluntary inspection he had arranged in January of 1990 to review the adequacy of the ventilation system in the plant. The result of that inspection was that at that period of time, the Ministry did not have cause for concern about the ventilation system for wood-work. Because the Ministry could not offer other suggestions for eliminating a noxious odour that the employees had experienced when cutting polyvinyl chloride, Mr. Parker declined a contract rather than risk the employees' health and safety.

17. Mr. Parker was not aware that Mr. Procter was an experienced spray painter and made no inquiries prior to the lay-off as to whether he had any of the skills needed for the new equipment. Mr. Procter has quite diverse experience on a number of kinds of machinery from his past work experience in a gun manufacturing plant and in spray painting metal. Mr. Parker maintains that Mr. Procter's experience at Whitler Industries did not include anything other than unskilled work. Mr. Procter said he helped in many areas and was skilled on all the equipment which was in the plant prior to his lay-off.

18. Brian Bird worked on the second table saw with Mr. Procter from October 22, 1990 until his lay-off on March 12, 1991. He testified that a new employee was hired to work exclusively on the table saw Mr. Procter had been operating from two weeks after Mr. Procter's departure for a period of approximately one month. Mr. Kennedy confirmed this testimony. Mr. Parker was not aware of the existence of this employee, who was apparently let go by the foreman because he had missed three days of work. Subsequent to that an employee who had previously worked in the finishing area of the plant worked at Mr. Procter's job.

Argument

19. In his summation Mr. Parker asked us to find that there was no taint in the discharge, although he acknowledged that the timing of it was unfortunate. He stated that he had no doubt in his mind that the termination by way of lay-off was in no way tainted by Mr. Procter's health and safety activities prior to or at the time of the lay-off. He pointed to the evidence that the restructuring was already in place well before the lay-off. He noted that there was no dispute as to the acquisition of the new equipment or the need for experienced people to operate it. He referred the Board to the company's good safety record and assured the Board that at no time would he knowingly or intentionally tolerate disregard for the safety of employees, because of his moral and legal responsibility. He suggested perhaps that he should have laid Mr. Procter off while he was on Workers' Compensation benefits, but that he had not wished to do so, not feeling that was morally correct.

20. On behalf of the complainant, Ms. Vannucci-Santini said that the employer had not discharged the onus of proof in section 24. She noted in particular the absence of any evidence from Mr. Dalahay and asked us to draw a negative inference from the employer's failure to call Mr. Dalahay as a witness. She suggested that we could conclude that Mr. Dalahay would not have been supportive of Mr. Parker's position if he had come to give evidence. As to the reason given for the lay-off, the stated reason on the record of employment is "shortage of work". Counsel submits that even on the respondent's evidence it is not a question of shortage of work, it is a question of reorganization of the workplace. She asked why Mr. Procter was given a week's worth of work on the morning of February 11 if he was going to be laid off on February 11. The Plant Manager made it quite clear on February 11 that he was being fired that day. Ms. Vannucci-Santini referred to *Inco Metals Co.* [1980] OLRB Rep. July 981, *Trelford Automobile Limited*, [1990] OLRB Rep. Nov. 1155, *Art Shoppe*, [1988] OLRB Rep. Aug. 729 and *Blenkhorn & Sawle Ltd.*, [1990] OLRB Rep. Sept. 921 as support for her submission that this is a case which should be remedied by the Board by way of reinstatement and full compensation.

Decision

21. The issue before the Board is whether or not Mr. Procter's lay-off was in any way a response to his exercise of his rights under the *Occupational Health and Safety Act*.

22. The relevant statutory provision are as follows:

23.-

• • •

(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circum-

stances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

(12) The time spent by a person mentioned in clause (4)(a), (b) or (c) in carrying out his duties

under subsections (4) and (7), shall be deemed to be work time for which the person shall be paid by his employer at his regular or premium rate as may be proper.

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

• • •

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

• • •

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

23. The Board has consistently held that these provisions mean that the employer bears the onus of showing that no part of the reason for the discharge of the employee was activity protected under the OHSA. The fact that there may be legitimate reasons coexisting with reasons prohibited by the OHSA, is not a defence to a complaint under section 24. See, among others, *Commonwealth Construction Company*, [1987] OLRB Rep. July 961 at paragraph 21. An employer has the right to lay-off or discipline an employee, provided that the action is not motivated, even in part, because an employee was seeking to exercise rights under the OHSA.

24. In this case, although Mr. Parker testified that copies of the OHSA were available in the plant Manager's office, no reference was made to them by the employer at the time of Mr. Procter's objection on the morning of February 11, 1991. The employer does not challenge the complainant's evidence that he raised *bona fide* safety concerns with the Plant Manager on February 11 and refused to work because of them. We are satisfied in the face of Mr. Procter's uncontradicted evidence, that he made it clear to Mr. Dalahay, albeit angry himself, that he was refusing to work because he considered the workplace unsafe. The provisions of the OHSA in respect of the requirement in section 23(4) that the supervisor should investigate the report in the presence of

the worker and a health and safety representative were not followed. The uncontradicted evidence is that Mr. Dalahay's immediate response to the raising of the conditions of the workplace was anger and dismissal of the complaints, basically indicating to Mr. Procter that he had no intention of doing anything about them then or in the foreseeable future. We are satisfied that Mr. Procter had reason to believe that the situation in the workplace was likely to endanger himself. The uncontradicted evidence is that the state of debris made it difficult to operate the saw safely and the failure to have the door latched properly left Mr. Procter and others in the same danger as Mr. Procter had been when he lost part of his finger a month earlier. The fact that Mr. Procter and others could have avoided such an accident by turning the power off does not make Mr. Procter's position that the state of the workplace was a potential danger one that is without foundation.

25. On that same day, Mr. Dalahay communicated to Mr. Procter that he was terminated. He also communicated to Mr. Kennedy that Mr. Procter had been fired in a context in which it was linked with the safety condition of the workplace. Although we accept that the company was in the midst of a reorganization, Mr. Procter was brought back to work with the expectation that he would work at least another week. Mr. Bird, who apparently had an unsatisfactory work record compared to Mr. Procter's, worked another month. Against this background, we are unable to accept that the sole reason for the lay-off on February 11, was the reorganization of the workplace. Mr. Dalahay played a prominent role in the lay-off and the communication to Mr. Procter of the reasons for it. The fact that we did not hear from him that there was no thought in his mind of the health and safety activities of February 11 and earlier is a serious gap in the respondent's case. Furthermore, Mr. Parker communicated to the Board three different reasons for the lay-off. These were reorganization, lack of work, as recorded on the record of employment, and temper, as communicated to Mr. Procter in the exit interview. Although any of the three of those are unobjectionable reasons under the OHSA for laying off or terminating a person, the fact that a variety of reasons were given raises the question as to which, if any of them, was the true reason. The uncontradicted evidence was that on the morning of February 11, before the incident between Mr. Dalahay and Mr. Procter, Mr. Procter was handed a "cut list" with a week's work on it. Mr. Parker testified that it was intended that he would work at least a week on his return to work. No reason was given for merely giving him pay rather than having him do the rest of the intended work, if that was the case. Mr. Bird, the other person selected for lay-off was kept on until March 12. A new employee did Mr. Procter's job for a month before a more senior employee was reallocated to it. There was no explanation of why a lay-off for reorganisation or shortage of work resulted in Mr. Bird's being kept a month longer than Mr. Procter. When this is put together with the fact that no inquiries were made of Mr. Procter as to whether he had the skills to fill the other jobs available, we cannot be satisfied that no part of the reason for the lay-off was a response to Mr. Procter's exercise of his rights under the OHSA at various times during his employment, including the morning of February 11, 1991.

26. For the above reasons we find that the employer violated the OHSA in discharging Mr. Procter. The complaint is allowed. Mr. Procter is to be reinstated and compensated for his losses due to the lay-off. We will remain seized if the parties are unable to agree on the quantum of compensation owing.

DECISION OF BOARD MEMBER R. W. PIRRIE: May 3, 1991

I concur in the majority decision which finds the employer violated the OHSA in discharging Mr. Procter. However, I dissent from that portion of the remedy which would reinstate Mr. Procter and I do so for the reason that it will, based on my understanding of the work organization, likely result in the lay-off of another employee with a start date prior to Mr. Procter's.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0153-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Novocol Pharmaceutical of Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Cambridge, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*)

1057-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Gorf Contracting Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Town of Kirkland Lake and the geographic Townships adjacent thereto in the District of Temiskaming, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1066-90-R: International Association of Machinists & Aerospace Workers (Applicant) v. Natural Resources Gas Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the County of Elgin, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week" (13 employees in unit) (*Having regard to the agreement of the parties*)

1232-90-R: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Local B-173 (Applicant) v. Hamilton Entertainment & Convention Facilities Inc. (Respondent)

Unit: "all employees of the respondent at the Hamilton Place Theatre, 50 Main Street West, Hamilton, Ontario, save and except operations manager, persons above the rank of operations manager, security guards, office, clerical and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of August 7, 1990" (80 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1825-90-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Call-a-Cab Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all dependent contractors of the respondent in its taxi service working in the City of Peterborough, save and except supervisors, those above the rank of supervisor, dispatchers, call takers, maintenance staff, office and clerical staff, and multi-car/multi-plate owners/lessees" (20 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1831-90-R: United Steelworkers of America (Applicant) v. Minnova Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at its Winston Lake Division in the District of Thunder Bay, save and except forepersons, persons above the rank of forepersons, office, technical, clerical and sales staff, students employed during the school vacation period and students employed in a cooperative training program” (104 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1936-90-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Rich Products of Canada, Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the City of Fort Erie, save and except supervisor, persons above the rank of supervisor, lab technicians, office and clerical staff, sales persons and security staff” (185 employees in unit) (*Having regard to the agreement of the parties*)

2204-90-R: Syndicat Canadien de la Fonction Publique (Applicant) v. Le Conseil des écoles française de la communauté urbaine de Toronto (Respondent)

Unit: “tous les employés de l’intimé dans la municipalité du Toronto métropolitain à l’exception des superviseurs et des personnes de niveau supérieur à celui de superviseur, secrétaire à l’agent du personnel, secrétaire au directeur d’éducation, secrétaire du superintendant de l’éducation (personnel), les concierges, les employés d’entretien, secrétaire au superintendant d’affaires, le comptable, le commis de paye, technicien, secrétaire au superintendant de programme, et les personnes au nom de qui un syndicat obtient des droits de négociation à la date à laquelle la requête a été soumise: le 16 novembre 1990” (43 employees in unit) (*Having regard to the agreement of the parties*)

2306-90-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The West Parry Sound Board of Education (Respondent)

Unit: “all custodial and maintenance persons employed by the respondent in the District of Parry Sound, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of November 30, 1990” (34 employees in unit) (*Having regard to the agreement of the parties*)

2332-90-R: United Steelworkers of America (Applicant) v. Shop-Vac of Canada Ltd. (Respondent)

Unit: “all employees of the respondent in Burlington, save and except supervisors, those above the rank of supervisor, office and sales staff and quality control technician” (30 employees in unit) (*Having regard to the agreement of the parties*)

2701-90-R: Hospitality, Commercial & Service Employees Union, Local 73 of the Hotel Employees & Restaurant Employees International Union (Applicant) v. 510412 Ontario Ltd., c.o.b. as The Waverley Hotel (Respondent)

Unit: “all employees of the respondent in Thunder Bay, save and except Assistant Manager, those above the rank of Assistant Manager, office staff, those persons for whom any trade union held bargaining rights as of January 14, 1991” (3 employees in unit) (*Having regard to the agreement of the parties*)

2742-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Kehl Tools Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Township of Sandwich West, save and except foremen and persons above the rank of foreman, office and sales staff” (13 employees in unit) (*Having regard to the agreement of the parties*)

2792-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Enerlite Electrical Services Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (12 employees in unit)

2833-90-R: Ontario Nurses’ Association (Applicant) v. Villa St. Joseph’s Villa (Respondent)

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent in Cornwall, save and except Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than 24 hours per week” (5 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all registered and graduate nurses employed in a nursing capacity regularly employed for not more than 24 hours per week by the respondent in Cornwall, save and except Director of Nursing, persons above the rank of Director of Nursing” (12 employees in unit) (*Having regard to the agreement of the parties*)

2846-90-R: Canadian Union of Public Employees (Applicant) v. Robertson House Ltd. Partnership (Respondent)

Unit #1: “all employees of the respondent in the City of Nepean, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (21 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Pre-Hearing Vote*)

2867-90-R: International Brotherhood of Painters & Allied Trades, Local 205 (Applicant) v. Empire Building (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2935-90-R: Labourers’ International Union of North America, Local 1081 (Applicant) v. Normbau 2000 Construction Inc. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 785 (Intervener) v. Group of Employees (Objectors)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2937-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Denos Aluminum Installation Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and

Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2938-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Unique Trim Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2956-90-R: Ontario Public Teachers’ Federation (Applicant) v. Fort Frances-Rainy River Board of Education (Respondent) v. Ontario Secondary School Teachers’ Federation, District #53 Office (Intervener) v. Group of Employees (Objectors)

Unit: “all educational assistants employed by the respondent in the District of Rainy River, save and except superintendent of education and persons above the rank of superintendent of education” (46 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2959-90-R: Hotel, Clubs, Restaurant, Taverns Employees Union, Local 261 (Applicant) v. Relax Hotels & Resorts Ltd. c.o.b. Relax Plaza Hotel, Ottawa (Respondent)

Unit: “all employees of the respondent in Ottawa, save and except Assistant Manager, persons above the rank of Assistant Manager, Front Office Manager, Maintenance/Operations Manager, front office clerks, and night auditors” (20 employees in unit) (*Having regard to the agreement of the parties*)

3058-90-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Zerofibre Systems Inc. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

3085-90-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Peel Board of Education (Respondent)

Unit: “all employees of the respondent in the Region of Peel employed as speech therapists, psychologists, and social workers, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, university students employed for the purpose of a cooperative education program, and employees in bargaining units for which any trade union held bargaining rights as of February 25, 991” (117 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3092-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Delsan Demolition (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and car-

penters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3140-90-R: London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Steeves & Rozema Enterprises Ltd. (Respondent)

Unit: "all employees of the respondent at 711 Indian Road N. in Sarnia regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff" (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3151-90-R: Canadian Union of Public Employees (Applicant) v. The Hastings Prince Edward County Roman Catholic Separate School Board (Respondent)

Unit: "all employees of the respondent in the County of Hastings and in the County of Prince Edward employed as teacher aides, save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of February 28, 1991" (15 employees in unit) (*Having regard to the agreement of the parties*)

3164-90-R: The Employees Association of Murphy Ambulance Ltd. (Applicant) v. Murphy Ambulance Service Ltd. (Respondent)

Unit: "all employees of the respondent in Delhi, save and except supervisors, persons above the rank of supervisor" (8 employees in unit) (*Having regard to the agreement of the parties*)

3188-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. T & T Finish Carpentry Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3190-90-R: London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Cedarwood Acres Ltd. (Respondent)

Unit #1: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

Unit #2: "registered and graduate nurses employed by the respondent in a nursing capacity for not more than 24 hours per week at the Cedarwood Village Nursing Home in the Town of Simcoe, save and except supervisors, persons above the rank of supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

3195-90-R: Teamsters Chemical, Energy & Allied Workers, Local 424 (Applicant) v. ACIC (Canada) Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Brantford, save and except those above the rank of supervisor, office, sales and technical staff" (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3198-90-R: United Steelworkers of America (Applicant) v. Labour Community Services of Waterloo Region (Respondent)

Unit: “all office and clerical employees of the respondent in the Regional Municipality of Waterloo, save and except supervisors, persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

3232-90-R: Public Service Alliance of Canada (Applicant) v. Multicultural Assistance Services of Peel (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Peel, save and except Managers, persons above the rank of Manager, and students employed during the school vacation period” (24 employees in unit) (*Having regard to the agreement of the parties*)

3238-90-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Suburban Drywall & Acoustics Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

3239-90-R: Canadian Union of Public Employees (Applicant) v. Wise Owl Day Care Centre (Respondent)

Unit: “all employees of the respondent in Pembroke, save and except supervisors, persons above the rank of supervisor and the confidential secretary to the Executive Director” (14 employees in unit) (*Having regard to the agreement of the parties*)

3240-90-R: Teamsters Local Union 419 (Applicant) v. Weldco Oxygen Inc. (Respondent)

Unit: “all employees of the respondent in Metropolitan Toronto, save and except Dispatcher, persons above the rank of Dispatcher, office and sales staff” (5 employees in unit) (*Having regard to the agreement of the parties*)

3269-90-R: Retail, Wholesale & Department Store Union (Applicant) v. Medical Pharmacy (Sudbury) Ltd. (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Sudbury, save and except pharmacists and persons above the rank of pharmacist” (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3273-90-R: Teamsters Local Union 938 (Applicant) v. Handi Transit Inc. (Respondent)

Unit: “all employees of the respondent in Oshawa, save and except Dispatcher, those above the rank of Dispatcher, office and sales staff” (15 employees in unit) (*Having regard to the agreement of the parties*)

3284-90-R: Service Employees Union, Local 268 (Applicant) v. Auxiliary to McKeller General Hospital (Respondent)

Unit: “all employees of the respondent in the City of Thunder Bay, save and except the Manager, persons above the rank of Manager” (12 employees in unit) (*Having regard to the agreement of the parties*)

3302-90-R: Service Employees’ Union, Local 210 (Applicant) v. The Windsor & Essex County Real Estate Board (Respondent)

Unit: “all office, clerical and print shop employees of the respondent in the City of Windsor regularly

employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*)

3305-90-R: Ontario Public Service Employees Union (Applicant) v. Kincardine & District General Hospital (Respondent)

Unit: “all paramedical employees of the respondent in the Township of Kincardine, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and employees in bargaining units for which any trade union held bargaining rights as of March 13, 1991” (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3322-90-R: Ontario Public Service Employees Union (Applicant) v. Renfrew County & District Health Unit (Respondent) v. Group of Employees (Objectors)

Unit #1: “all office and clerical employees of the respondent in Renfrew County and District, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, Executive Assistant to the Medical Officer of Health, Senior Secretary to the Business Administrator/Secretary Treasurer of the Board, Payroll Clerk/Accountant, Executive Secretary to the Director-Home Care Program, Senior Secretary to the Director of Nursing, Home Care Accountant, Secretary to Supervisor-Adult Protective Program, Secretary to the Dental Director and Secretary to Director of Environmental Health” (29 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all office and clerical employees of the respondent in Renfrew County and District, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, Executive Assistant to the Medical Officer of Health, Senior Secretary to the Business Administrator/Secretary Treasurer of the Board, Payroll Clerk/Accountant, Executive Secretary to the Director-Home Care Program, Senior Secretary to the Director of Nursing, Home Care Accountant, Secretary to Supervisor-Adult Protective Program, Secretary to the Dental Director and Secretary to Director of Environmental Health” (7 employees in unit) (*Having regard to the agreement of the parties*)

3323-90-R: Ontario Public Service Employees Union (Applicant) v. Palmerston & District Hospital (Respondent)

Unit #1: “all office and clerical employees of the respondent in the Town of Palmerston, save and except supervisors, persons above the rank of supervisor, paramedical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of March 14, 1991” (5 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all office and clerical employees of the respondent in the Town of Palmerston, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, paramedical employees, and employees in bargaining units for which any trade union held bargaining rights as of March 14, 1991” (6 employees in unit) (*Having regard to the agreement of the parties*)

3324-90-R: Ontario Public Service Employees Union (Applicant) v. Palmerston & District Hospital (Respondent)

Unit #1: “all employees of the respondent in the Town of Palmerston, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, paramedical employees, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of March 14, 1991” (24 employees in unit) (*Having regard to the agreement of the parties*)

Unit #1: “all employees of the respondent in the Town of Palmerston regularly employed for not more than

24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, paramedical employees, office and clerical staff, and employees in bargaining units for which any trade union held bargaining rights as of March 14, 1991” (33 employees in unit) (*Having regard to the agreement of the parties*)

3345-90-R: United Steelworkers of America (Applicant) v. Chestwood Stationery Ltd. (Respondent)

Unit: “all employees of the respondent in the Town of Markham, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period” (19 employees in unit) (*Having regard to the agreement of the parties*)

3362-90-R: Can-Ar Transit Operators Association (Applicant) v. Tokmakjian Ltd. (Respondent)

Unit: “all employees of the respondent at its Can-Ar Transit Services Division in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (29 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3373-90-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Sussex Painters & Decorators (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

3394-90-R: Teamsters Local Union 938 (Applicant) v. Riello Canada Inc. (Respondent)

Unit: “all employees of the respondent in Mississauga, save and except supervisors, persons above the rank of supervisor, warranty technician, office and sales staff” (11 employees in unit) (*Having regard to the agreement of the parties*)

3396-90-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. George Stone & Sons Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

3412-90-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. R.M. Belanger Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

3413-90-R: Office & Professional Employees Union, Local 225 (Applicant) v. Maison Baldwin House Inc. (Respondent)

Unit: “all employees of the respondent in the City of Cornwall, save and except staff coordinator/supervisor, persons above the rank of staff coordinator/supervisor and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3415-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Hotels Ltd. c.o.b. as Hallmark Hornepayne Centre/Centre Inn (Respondent)

Unit #1: “all employees of the respondent in the Town of Hornepayne, save and except Assistant Managers and those above the rank of Assistant Manager, office staff and persons employed for not more than 24 hours per week and students employed during the school vacation period” (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all employees of the respondent employed for not more than 24 hours per week and students employed during the school vacation period in the Town of Hornepayne, save and except Assistant Managers and those above the rank of Assistant Manager and office staff” (20 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3442-90-R: London & District Service Workers’ Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Anselma House (Respondent)

Unit: “all employees of the respondent in Kitchener, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (19 employees in unit) (*Having regard to the agreement of the parties*)

3457-90-R: London & District Service Workers’ Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Aids Committee of Cambridge, Kitchener, Waterloo and Area (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Kitchener, save and except supervisors, persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

3459-90-R: Canadian Union of Public Employees (Applicant) v. Fraser School Community Day Care Centre (Respondent)

Unit: “all employees of the respondent in Metropolitan Toronto, save and except supervisor, persons above the rank of supervisor” (9 employees in unit) (*Having regard to the agreement of the parties*)

3463-90-R: Federation of Teachers in Hebrew Schools (Applicant) v. Shaar Shalom Synagogue (Respondent)

Unit: “all teachers and tutors employed in the field of Jewish education by the respondent at its Shaar Shalom Religious School in the Municipality of Metropolitan Toronto and the Regional Municipality of York, save and except the Principal, persons above the rank of Principal, the Congregational Rabbi and Guest Lecturers” (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3465-90-R; 3466-90-R: Retail, Wholesale & Department Store Union (Applicant) v. Village Central Investments Inc. c.o.b. as Village Grocery Foodtown (Respondent)

Unit: “all employees of the respondent in the Township of Armour, save and except the Store Manager, persons above the rank of Store Manager and office staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

3468-90-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Frontenac County Board of Education (Respondent) v. Canadian Union of Public Employees and its Locals 1480 and 1727 (Intervener)

Unit: “all employees of the respondent in the County of Frontenac, save and except supervisors, those above the rank of supervisor and persons for whom any union held bargaining rights as of March 28, 1991” (33 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0015-91-R: Ontario Public Service Employees Union (Applicant) v. Sherwood Park Manor (Respondent)

Unit #1: “all employees of the respondent in the City of Brockville, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, paramedical employees, office and clerical staff, persons regularly employed for not more than 24 hours per week

and students employed during the school vacation period” (30 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all employees of the respondent in the City of Brockville, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, paramedical employees, office and staff” (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0016-91-R: Office & Professional Employees International Union (Applicant) v. Habitat Interlude Inc. (Respondent)

Unit: “all employees of the respondent in Kapuskasing, save and except the director and persons above the rank of director” (8 employees in unit) (*Having regard to the agreement of the parties*)

0052-91-R; 0053-91-R: Service Employees’ International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Niagara-On-The-Lake General Hospital (Respondent)

Unit: “all employees of the respondent in the Town of Niagara-On-The-Lake, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered nurses, paramedical employees, ambulance staff, secretary to the administrator and bookkeeper” (40 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0054-91-R: Hotel Employees & Restaurant Employees Union, Local 75 (Applicant) v. Restauronic Services Inc. (Respondent)

Unit: “all employees of the respondent at its 1 Carlingview Cafeteria in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office, sales and accounting staff, and security staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

0136-91-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. Olympia & York Developments Ltd. (Respondent)

Unit: “all security guards employed by the respondent at the premises known as Queens Quay, 207 Queens Quay West, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week” (10 employees in unit) (*Having regard to the agreement of the parties*)

0137-91-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. Olympia & York Developments Ltd. (Respondent)

Unit: “all security guards employed by the respondent for not more than 24 hours per week at the premises known as Queens Quay, 207 Queens Quay West, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

0141-91-R: Ontario Public School Teachers’ Federation (Applicant) v. The Board of Education for the City of Etobicoke (Respondent)

Unit: “all educational assistants employed by the respondent in the Municipality of Metropolitan Toronto, save and except assistant superintendents, persons above the rank of assistant superintendent, persons regularly employed for not more than 15 hours per week and persons in bargaining units for which any trade union held bargaining rights as of April 12, 1991” (101 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Bargaining Agents Certified Subsequent to Pre-Hearing Vote

2399-90-R: Canadian Union of Public Employees (Applicant) v. Toronto Board of Education (Respondent)

Unit: “all Heritage Language and Concurrent Program Instructors employed by the respondent in the City of Toronto, save and except supervising principals, persons above the rank of supervising principal and persons for whom any trade union held bargaining rights as of December 5, 1990, being the date of application” (503 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	503
Number of persons who cast ballots	205
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	196
Number of segregated ballots cast by persons whose names do not appear on voters' list	9
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	179
Number of ballots marked against applicant	15
Ballots segregated and not counted	9

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3247-89-R; 3305-89-R: The Carleton Roman Catholic Separate School Board Employees' Association and the Ottawa Board of Education Employees' Union (Applicants) v. The Ottawa-Carleton French Language School Board (Full Board), The Ottawa-Carleton French Language School Board (Catholic Sector), and The Ottawa-Carleton French Language School Board (Public Sector) (Respondent) v. Service & Commercial Employees Union, Local 272 (Intervener)

Unit: “tous les employés affectés à l'entretien et à l'exploitation des bâtiments et lieux, de l'ameublement et de l'équipement d'entretien du Conseil scolaire de langue française d'Ottawa-Carleton, à l'exception des superviseurs et des personnes de niveau supérieur à celui de superviseur, du personnel de bureau et de secrétariat” (22 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	14
Number of ballots marked in favour of intervener	0

2197-90-R: Ontario Public Service Employees Union (Applicant) v. The Wellington County Board of Education (Respondent) v. The Ontario Secondary School Teachers' Federation (Intervener)

Unit: “all employees of the respondent in the County of Wellington, employed as teacher assistants or special programme assistants, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of November 21, 1990” (125 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	132
Number of persons who cast ballots	104
Number of ballots marked in favour of intervener	62
Number of ballots marked against intervener	42

2846-90-R: Canadian Union of Public Employees (Applicant) v. Robertson House Ltd. Partnership (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: “all employees of the respondent in the City of Nepean, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor” (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	21
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	18

Number of ballots marked against applicant

2

3190-90-R: London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Cedarwood Acres Ltd. (Respondent)

Unit #1: "all registered and graduate nurses employed by the respondent in a nursing capacity, at Cedarwood Village Nursing Home in the Town of Simcoe, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	1

Unit #2: (see *Bargaining Agents Certified Without Vote*)

Applications for Certification Dismissed Without Vote

1987-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ryder Concrete Forming Specialists Ltd. (Respondent) v. Group of Employees (Objectors) (9 employees in unit)

2753-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. W. United General Contractor & Construction Company (Respondent) (2 employees in unit)

2843-90-R; 3274-90-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Metropolitan General Hospital (Respondent) v. Service Employees' International Union, Local 210 (Intervener) (231 employees in unit)

2914-90-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Salvation Army Grace Hospital (Respondent) v. Service Employees' International Union, Local 210 (Intervener) (287 employees in unit)

2936-90-R: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Normbau 2000 Construction Inc. (Respondent) v. Labourers' International Union of North America, Local 1081 (Intervener) v. Group of Employees (Objectors) (3 employees in unit)

3286-90-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. Van Horne Fish Distributors Ltd. (Respondent) v. Anthony C. Mercury and George Tsiodras, (Group of Employees) (15 employees in unit)

0035-91-R: Canadian Union of Public Employees (Applicant) v. The Toronto Hospital - General Division (Respondent) (700 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2581-90-R: The Amalgamated Transit Union, Local 1572 (Applicant) v. McDonnell - Ronald Limousine Services Ltd. o/a Airline Limousine Services Ltd. (Respondent)

Unit: "all dependent contractors of the respondent in its limousine service working in and out of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors, and those above the rank of supervisor" (250 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	316
Number of persons who cast ballots	226
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	101

Number of ballots marked against applicant

124

2945-90-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. Ault Foods Ltd. (Respondent) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Local No. 647 (Intervener)

Unit: “all employees of the respondent at the Toronto, Ontario District, at the Don Mills branch plant and garage and any other operation within Metropolitan Toronto, save and except plant protection employees, office staff, chief engineers, foremen, milk route foremen, those above the rank of foremen and milk route foremen, territory salesman, and persons covered by subsisting collective agreement and persons engaged on a casual basis to replace regular employees who are off work due to sickness or accident provided such period is less than 24 hours per week” (141 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	189
Number of persons who cast ballots	161
Number of ballots marked in favour of applicant	69
Number of ballots marked in favour of intervener	92

2947-90-R: Canadian Union of Public Employees (Applicant) v. Hydro-Electric Commission of Waterloo, Wellesley & Woolwich (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: “all employees of the Commission, save and except confidential employees, supervisors and foremen and those above the rank of foreman, temporary employees and students employed during the school vacation and/or work seminars” (84 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	84
Number of persons who cast ballots	79
Number of ballots marked in favour of applicant	17
Number of ballots marked in favour of intervener	62

3272-90-R: Construction Workers, Local 53, CLAC (Applicant) v. Sass Manufacturing Company Ltd. (Respondent) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 127 (Intervener)

Unit: “all employees of the employer employed at and working out of Chatham, Ontario, save and except supervisors, persons above the rank of supervisor and office staff” (42 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	44
Number of ballots marked in favour of applicant	14
Number of ballots marked in favour of intervener	30

Applications for Certification Dismissed Subsequent to A Post-Hearing Vote

2301-88-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. D. R. Devine Roofing & Sheet Metal (Respondent) v. Group of Employees (Objectors)

Unit: “all roofers and roofers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all roofers and roofers' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman” (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	3

3044-90-R: The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. The Windsor Star, A Division of Southam Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its Advertising Department in the County of Essex, save and except Advertising Director, Retail Advertising Manager, National Advertising Manager, Classified Advertising Manager, Advertising Services Manager, Ad-Visor Supervisor, Community Relations Manager, Advertising Services Supervisor, Classified Advertising Supervisor, Art Supervisor, Co-operative Advertising Coordinator, Secretary to the Advertising Director, Secretary to the Classified Advertising Manager, Secretary to the Retail Advertising Manager and Secretary to the National Advertising Manager" (77 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	65
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	38
Ballots segregated and not counted	4

3136-90-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 848347 Ontario Ltd. c.o.b. as Solid Gold Inn (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at the Solid Gold Inn in Burlington, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff" (29 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	28
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	16

Applications for Certification Withdrawn

2066-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Matthews Contracting Inc. (Respondent) v. The Form Work Council of Ontario (Intervener #1) v. Labourers' International Union of North America, Local 183 (Intervener #2) v. Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Intervener #3)

2342-90-R: Hotel Employees & Restaurant Employees Union, Local 75 (Applicant) v. Johnson Controls Ltd. and Trans-American Management Inc. c.o.b. as Skyline Toronto Airport Hotel (Respondent)

2446-90-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Freure Construction Ltd. (Respondent)

2483-90-R: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Freure Construction Ltd. (Respondent) v. Labourers' International Union of North America, Local 1081 (Intervener) v. Group of Employees (Objectors)

2860-90-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. 620599 Ontario Inc. c.o.b. Domcan Acoustical Company (Respondent)

3033-90-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Process Mechanical Installations (PMI) Division of Process Industrial Company Inc. and Process Electrical Company Inc. (Respondents) v. International Brotherhood of Electrical Workers, Local 353 (Intervener)

3073-90-R: Raymond Wark (Applicant) v. United Food & Commercial Workers Locals 633 & 175 and United Food & Commercial Workers International Union (Respondents)

3150-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Sanet Mechanical Ltd. (Respondent)

3306-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Norev Sandblasting Ltd. c.o.b. as Northern Industrial Refractories Ltd. (Respondent)

3416-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Homepayne Centre/Centre Inn (Respondent)

3452-90-R: Teamsters Local Union 938 (Applicant) v. Brink's Canada Ltd. (Respondent)

0020-91-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. T & S Plastics Division of Vulcan Packaging Inc. (Respondent) v. Group of Employees (Objectors)

0022-91-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. 739183 Ontario Inc. c.o.b. as GM Contracting (Respondent)

0201-91-R: United Steelworkers of America (Applicant) v. ICG Propane Inc. (Respondent)

0203-91-R: International Brotherhood of Electrical Workers, Local 120 (Applicant) v. Pro Electric Inc. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1171-89-FC: United Food & Commercial Workers International Union, Local 206 (Applicant) v. Knob Hill Farms Ltd. (Respondent) (*Granted*)

2223-90-FC: Canadian Paperworkers Union (Applicant) v. Grant Forest Products Corp. (Respondent) (*Granted*)

2888-90-FCA: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Bonik Inc. (Respondent) (*Granted*)

0023-91-FC: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Supreme Carpentry Inc. (Respondent) (*Granted*)

0041-91-FC: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Thrifty Canada Ltd. c.o.b. as Thrifty Car Rental (Respondent) (*Withdrawn*)

0089-91-FC: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. S & R Department Store (1976) Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0563-90-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Bernard Normand, B & M Millwork Ltd. and Interior Wood Installations Inc., B. J. Normand (Quebec) Ltée (Respondents) (*Dismissed*)

2410-90-R: Labourers' International Union of North America, Local 527 (Applicant) v. Moffatt Construction & Materials Ltd., Moffatt Construction (1990) Inc., Ottawa Valley Investments Ltd. (Respondent) (*Withdrawn*)

2411-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Moffatt Construction & Materials Ltd., Moffatt Construction (1990) Inc., Ottawa Valley Investments Ltd. (Respondent) (*Withdrawn*)

2665-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the

United States & Canada, Local 71 (Applicant) v. A.A.D. Management Consultants and 809381 Ontario Inc. c.o.b. as M & D Plumbing (Respondents) (*Granted*)

2838-90-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Technology Service Corporation Inc. and CTG, a Division of TIE/Communications Canada Inc. (Respondents) (*Granted*)

3034-90-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. PMI, Division of Process Industrial Company Inc. and Process Electrical Company Inc. (Respondents) (*Withdrawn*)

3040-90-R: Labourers' International Union of North America, Local 1036 (Applicant) v. Future Care Ltd. and Kuco Construction Ltd. and 682901 Ontario Ltd. (Respondents) (*Withdrawn*)

3176-90-R: Bricklayers, Masons Independent Union of Canada (Applicant) v. Elio Dallas Construction Inc. and Bayfield Masonry Contractors Inc. (Respondents) (*Granted*)

SALE OF A BUSINESS

0563-90-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Bernard Normand, B & M Millwork Ltd. and Interior Wood Installations Inc., B. J. Normand (Quebec) Ltée (Respondents) (*Dismissed*)

2410-90-R: Labourers' International Union of North America, Local 527 (Applicant) v. Moffatt Construction & Materials Ltd., Moffatt Construction (1990) Inc., Ottawa Valley Investments Ltd. (Respondent) (*Withdrawn*)

2411-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Moffatt Construction & Materials Ltd., Moffatt Construction (1990) Inc., Ottawa Valley Investments Ltd. (Respondent) (*Withdrawn*)

2983-90-R: Graphic Communications International Union, Local 517M (Applicant) v. International Paper (Respondent) v. Energy & Chemical Workers Union, Local 30 (Intervener) (*Withdrawn*)

3040-90-R: Labourers' International Union of North America, Local 1036 (Applicant) v. Future Care Ltd. and Kuco Construction Ltd. and 682901 Ontario Ltd. (Respondents) (*Withdrawn*)

3176-90-R: Bricklayers, Masons Independent Union of Canada (Applicant) v. Elio Dallas Construction Inc. and Bayfield Masonry Contractors Inc. (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS

2694-90-R: Nipissing University College, and Canadore Community College (Applicant) v. O.P.S.E.U. (Respondent) (*Dismissed*)

2719-90-R: Group of Employees of Supercentre Store, #805 Murphy Road, Sarnia, Ontario, Employees are also members of U.F.C.W. #1000-A (Applicant) v. Zehrs Markets a Division of Zehrmart Ltd. (Respondent) v. United Food & Commercial Workers International Union, Local 1000A (Intervener) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1545-89-R: Susan Caterina (Applicant) v. United Food & Commercial Workers International Union, Local 206 (Respondent) v. Knob Hill Farms Ltd. (Intervener) (184 employees in unit) (*Dismissed*)

3055-89-R: David Dooley, on behalf of a group of employees of Ken Scharf Construction Ltd. (Applicant) v. Labourers' International Union of North America, Locals 527, 183, 247, 491, 493, 506, 597, 607, 625, 837,

1036, 1059, 1081, 1089, Labourers' International Union of North America, Ontario Provincial District Council (Respondent) v. Ken Scharf Construction Ltd. (Intervener)

Unit: "all construction labourers in the employ of Ken Scharf Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Ken Scharf Construction Limited in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

2743-90-R: Donald Taylor (Applicant) v. International Brotherhood of Painters & Allied Trades (Respondent) v. Nor-Vac Industrial Service Ltd., L.S. Kosowan Ltd. (Intervener)

Unit: "all full-time and part-time employees of the employer engaged in hydro-jet and wet and dry vacuum cleaning, working in and out of the City of Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff" (10 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

2830-90-R: Jeff Mazzone (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 414 (Respondent) v. Multitech Warehouse Direct (Ontario) Ltd. (Intervener)

Unit: "all employees at London, Ontario, save and except Store Manager and persons above the rank of Store Manager" (3 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

2995-90-R: John Hotzon (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 195 (Respondent) v. Border Steel Ltd. (Intervener)

Unit: "all employees of the company, save and except foremen, persons above the rank of foreman, clerical, office and sales staff, persons regularly employed for not more than 20 hours per week and students employed during the school vacation period" (11 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	9
Ballots segregated and not counted	1

3052-90-R: Beth Jackson (Applicant) v. Service Employees' International Union, Local 210 (Respondent) v. Relia-Care Inc., c.o.b. as Country Village Health Care Centre (Intervener)

Unit: "all employees of County Village Health Care Centre employed at its Nursing Home and Lodge at Woodslee, Ontario, save and except professional medical staff, registered nurses, supervisors, persons above the rank of supervisor, office staff, dietitians, physiotherapists and occupational therapists" (85 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	111
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Challenged persons struck off list by Registrar	111
Number of persons on voter's list at start of vote	111
Number of names of persons on revised voters' list	111
Number of persons who cast ballots	77
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	71

3110-90-R: Seevaratnam Pirabaharan (Applicant) v. The International Brotherhood of Painters & Allied Trades, Glaziers and Glassworkers, Local 1819 (Respondent) v. One Vinyl Window Manufacturers Ltd. (Intervener)

Unit: "all its employees in the City of Mississauga, save and except non-working foremen, persons above the rank of non-working foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (*Having regard to the agreement of the parties*) (*Granted*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	10

3148-90-R: Wieslaw Starowicz (Applicant) v. Labourers' International Union of North America, Local 1059 (Respondent) (*Withdrawn*)

3166-90-R: Summit Security Company Ltd. (Applicant) v. International Brotherhood of Electrical Workers, Local 402 (Respondent) v. Group of Employees (Objectors) (1 employees in unit) (*Granted*)

3231-90-R: Carey's Rest. Inc. (Applicant) v. Hotel, Restaurant Employees Union, Local 75 (Respondent) (*Withdrawn*)

3314-90-R: Paul Bartlett (Applicant) v. Service Employees Union, Local 183 (Respondent) v. City Ambulance Service of Quinte Ltd. (Intervener) (2 employees in unit) (*Granted*)

SCHOOL BOARDS, DECLARATION OF UNLAWFUL STRIKE

3205-90-U: Sault Ste. Marie District Roman Catholic Separate School Board (Applicant) v. Ontario English Catholic Teachers' Association; Local Branch Affiliate of the Ontario English Catholic Teachers' Association; Michael Cote; James Carey; Peter Murphy (Respondents) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3107-89-U: Everette Chappelle (Complainant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission Wheel Trans Department (Intervener) (*Dismissed*)

1027-90-U: Labourers' International Union of North America, Local 183 (Applicant) v. Toronto Structural Concrete Services Ltd. (Respondent) (*Granted*)

1150-90-U: Georgina Papagiannis (Complainant) v. Service Employees' International Union, Local 204 (Respondent) v. Wellesley Hospital (Intervener) (*Dismissed*)

1151-90-U: International Association of Machinists & Aerospace Workers, Local 184 (Complainant) v. Natural Resources Gas Ltd. (Respondent) (*Withdrawn*)

1547-90-U: Christopher Topple (Complainant) v. The International Union, United Plant Guard Workers of America, Local 1962 (Respondent) v. General Motors of Canada (Intervener) (*Dismissed*)

- 1827-90-U:** Retail, Wholesale & Department Store Union, (Complainant) v. Call-a-Cab Ltd. (Respondent) (*Granted*)
- 1899-90-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Kautex of Canada Inc. (Respondent) (*Withdrawn*)
- 1952-90-U:** Gustav Seide (Complainant) v. General Motors of Canada Ltd. (Respondent) (*Withdrawn*)
- 2102-90-U:** Ottawa-Carleton Public Employees Union, Local 503 (Complainant) v. The City of Ottawa, Mr. Pierre Crevier (Respondents) (*Withdrawn*)
- 2254-90-U:** Emilio De Santis (Complainant) v. Karen Hutson, C.U.P.E., Local 2221 (Respondents) v. Mario J. Calla - Costi-Iias Immigrant Services (Intervener) (*Dismissed*)
- 2307-90-U:** National Association of Broadcast Employees & Technicians, Local 700 (Complainant) v. Ontario Educational Communications Authority (Respondent) (*Withdrawn*)
- 2356-90-U:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Complainant) v. Pro-Mart Industrial Products Ltd. (Respondent) (*Withdrawn*)
- 2462-90-U:** Service Employees Union, Local 183 (Complainant) v. Gibson Holdings (Ontario) Ltd., Tim Gibson & Larry Gibson (Respondents) (*Withdrawn*)
- 2518-90-U:** Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 141 (Complainant) v. Bruce W. Smith Building Materials Ltd. (Respondent) (*Withdrawn*)
- 2534-90-U:** Canadian Union of Public Employees, Local 1219 (Complainant) v. The Corporation of the Town of Markham (Respondent) (*Withdrawn*)
- 2642-90-U:** Chris Petrou (Complainant) v. C.A.W., Local 222 (Respondent) (*Withdrawn*)
- 2802-90-U:** The Toronto Hospital (Complainant) v. Ontario Nurses' Association (Respondent) (*Dismissed*)
- 2847-90-U:** Canadian Union of Public Employees, Local 794 (Complainant) v. Hamilton Civic Hospitals (Respondent) (*Withdrawn*)
- 2861-90-U:** Canadian Paperworkers Union (Complainant) v. Grant Forest Products Corp. (Respondent) (*Granted*)
- 2889-90-U:** William Reginald Matthews (Complainant) v. Local 199 (CAW - Canada) (Respondent) (*Withdrawn*)
- 2898-90-U:** Energy & Chemical Workers Union (Complainant) v. Servicar Ltd. (Respondent) (*Withdrawn*)
- 3178-90-U:** The Newspaper Guild (CLC, AFL-CIO) (Complainant) v. The Windsor Star, A Division of Southam Inc. (Respondent) (*Dismissed*)
- 3050-90-U; 3060-90-U:** Hotel, Motel & Restaurant Employees Union, Local 442 (Complainant) v. Sheraton Fallsview, Hotel & Conference Centre (Respondent) (*Withdrawn*)
- 3065-90-U:** Joseph Spiteri (Complainant) v. A.F.G.M., Local 230 (Respondent) (*Withdrawn*)
- 3088-90-U:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Complainant) v. 620599 Ontario Inc. c.o.b. Domcan Acoustical Company (Respondent) (*Withdrawn*)
- 3096-90-U:** United Food & Commercial Workers Union, Local 175 (Complainant) v. Toys & Wheels (Respondent) (*Withdrawn*)

3129-90-U: Ontario Public Service Employees Union (H. King) (Complainant) v. Centennial College (Respondent) (*Withdrawn*)

3138-90-U: Nicole Petrin (Complainant) v. Canadian Union of Educational Workers, Local 2 (Respondent) (*Withdrawn*)

3139-90-U: United Food & Commercial Workers International Union, Local 175/633 (Complainant) v. Tryverse Ltd., c.o.b. Lilo Products (City of Hamilton, Ontario) (Respondent) (*Withdrawn*)

3160-90-U: United Brotherhood of Carpenters & Joiners of America, Local 785 (Complainant) v. Normbau 2000 Construction Inc. (Respondent) (*Withdrawn*)

3163-90-U: Blair B. Nowe (Complainant) v. Schneider Employee's Association and Harry Anger (Respondent) (*Withdrawn*)

3182-90-U; 3183-90-U; 3184-90-U; 3185-90-U; 3335-90-U; 3336-90-U; 3337-90-U; 3338-90-U: The Windsor Roman Catholic Separate School Board (Complainant) v. Service Employees International Union, Local 210 (Respondent) (*Withdrawn*)

3187-90-U: The Skilled Trades People of Local 2113 (Complainant) v. Ron Reynolds (President of Local 2113), Dave Ritchie (Business Rep. of Local 2113) (Respondents) (*Withdrawn*)

3197-90-U: United Food & Commercial Workers International Union, Toronto Industrial Council (Complainant) v. Sweet Ripe Drinks Inc. (Respondent) (*Withdrawn*)

3201-90-U; 3202-90-U; 3203-90-U; 3204-90-U: Ontario Nurses' Association (Complainant) v. The Toronto Hospital (formerly The Toronto General Hospital and The Toronto Western Hospital (Respondent) (*Withdrawn*)

3225-90-U: Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Complainant) v. Relax Plaza Hotel (Respondent) (*Withdrawn*)

3229-90-U: Labourers' International Union of North America, Local 506 (Complainant) v. E & M Precase Ltd. (Respondent) (*Withdrawn*)

3236-90-U: Howard Buchin (Complainant) v. Toronto Civic Employees' Union, Local 43 (Respondent) v. The Municipality of Metropolitan Toronto (Intervener) (*Dismissed*)

3271-90-U: Hotel Employees Restaurant Employees Union, Local 75 (Complainant) v. The Old Mill Restaurant (Old Mill Investments) (Respondent) (*Withdrawn*)

3300-90-U: Mr. Michael L. Peck (Complainant) v. Kingsway Transport Ltd., and Teamsters Union, Local #938, (Val Neal) (Respondents) (*Withdrawn*)

3333-90-U: Franklyn Brown (Complainant) v. Gerry Jones, H.E.R.E., Local 75 (Respondent) (*Dismissed*)

3340-90-U: Donald Triolo (Complainant) v. United Electrical, Radio & Machine Workers of Canada (UE), Local 512 (Respondent) v. Robertshaw Controls Canada Inc. (Intervener) (*Dismissed*)

3359-90-U: Brewery, Malt & Soft Drink Workers, Local 304 (Complainant) v. Van Horne Fish Distributors Ltd. (Respondent) (*Withdrawn*)

3381-90-U: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Complainant) v. T & T Finished Carpentry Ltd., Antonio Guimaraes and Loma Finished Carpentry (Respondents) (*Granted*)

3407-90-U: Toddglen Construction Ltd. (Complainant) v. The International Union of Bricklayers & Allied Craftsmen, Local 2 and J. Elliott (Respondents) (*Withdrawn*)

3426-90-U; 3441-90-U: Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Complainant) v. Relax Plaza Hotel (Respondent) (*Withdrawn*)

3430-90-U: Labourers' International Union of North America, Local 1081 (Complainant) v. Normbau 2000 Construction Inc. (Respondent) (*Withdrawn*)

0006-91-U: Relax Hotels & Resorts (c.o.b.) Relax Plaza Hotel Ottawa (Complainant) v. Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Respondent) (*Withdrawn*)

0049-91-U: Wilfred Henderson (Complainant) v. Teamsters, Local 230 (Respondent) (*Dismissed*)

0057-91-U: James W. Lyons (Complainant) v. Bud Exton, Local 1137 Etobicoke Professional Fire Fighters Association (Respondents) (*Dismissed*)

0076-91-U; Terry Ward (Complainant) v. County of Grey - Highways Dept. (Respondent) (*Dismissed*)

0116-91-U: Ironworkers Union, Local #835 (Complainant) v. Kawneer Company Canada Ltd. (Respondent) (*Dismissed*)

0131-91-U: United Food & Commercial Workers International Union, AFL-CIO, CLC (Complainant) v. Sweet Ripe Drinks Inc. (Respondent) Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Complainant) v. Relax Plaza Hotel (Respondent) (*Withdrawn*)

0138-91-U: Stormont, Dundas & Glengarry County Roman Catholic School Board (Applicant) v. L'Association des Enseignantes et Enseignants Franco-Ontariens and their branch affiliate for the Secondary Section Stormont, Dundas & Glengarry County Roman Catholic School Board; The Ontario Secondary School Teachers' Federation and their branch affiliate District 21; Maurice Lafreniere; Bernardette Stevens, et al (Respondent) (*Withdrawn*)

0248-91-U: Yvonne Pearson (Complainant) v. Henderson General Hospital (Respondent) (*Dismissed*)

0261-91-U: Glaister Green (Complainant) v. General Mills Canada Inc. (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3010-90-M: Wilson's Truck Lines Ltd. (Employer) v. The Canadian Union of Drivers & General Workers (Trade Union) (*Granted*)

3153-90-M: Regional Ready Mixed Concrete Company (Employer) v. Christian Labour Association of Canada (Trade Union) (*Granted*)

3154-90-R: Jen-Ry Utility Contracting Company Ltd. (Employer) v. Christian Labour Association of Canada (Trade Union) (*Granted*)

3261-90-M: J. M. Schneider Poultry Inc. (Employer) v. United Food & Commercial Workers International Union, Local 175 (Trade Union) (*Granted*)

3288-90-M: The Textile Rental Institute of Ontario by and on behalf of Booth Avenue Hospital Laundry Inc., Centennial Hospital Linen Services, and London Hospital Linen Services (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

0071-91-M: Work Wear Corporation of Canada Ltd., Belleville, Ontario (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

0118-91-M: Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 91 (Employer) v. H. Fine & Sons Ltd. (Trade Union) (*Granted*)

0119-91-M: Gibson's Cleaners Co. Ltd. (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

1526-89-JD: Calorific Construction Ltd. (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 446, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 508, The Ontario Erectors Association, Inc. and The Ontario Erectors Association and the International Association of Bridge, Structural & Ornamental Ironworkers District Council of Ontario, Local 786, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3089-89-M: Canadian Union of Public Employees and its Local 443 (Applicant) v. City of Owen Sound (Respondent) (*Granted*)

0812-90-M: Ontario Nurses' Association (Applicant) v. Regional Municipality of Niagara, Homes for the Aged (Linhaven, Sunset Haven) (Respondent) (*Granted*)

1096-90-M: West Parry Sound Board of Education (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent) (*Granted*)

1953-90-M: Canadian Union of Public Employees, Local 1997 (Applicant) v. Eastern Ontario Health Unit (Respondent) (*Withdrawn*)

2330-90-M: Canadian Union of Public Employees, Local 3367 (Applicant) v. William W. Creighton Centre (Respondent) (*Withdrawn*)

2573-90-M: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Public Utilities Commission of the Corporation of the City of Chatham (Respondent) (*Granted*)

2768-90-M: Ontario Public Service Employees Union (Applicant) v. Niagara South Board of Education (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2479-88-OH; 2480-88-OH; 2481-88-OH; 2482-88-OH; 2483-88-OH; 2484-88-OH; 2485-88-OH; 2486-88-OH; 2487-88-OH; 2488-88-OH; 2489-88-OH; 2490-88-OH; 2491-88-OH; 2492-88-OH; 2493-88-OH; 2494-88-OH; 2495-88-OH; 2496-88-OH; 2497-88-OH; 2498-88-OH; 2499-88-OH; 2500-88-OH; 2501-88-OH; 2502-88-OH; 2503-88-OH; 2504-88-OH; 2505-88-OH; 2506-88-OH; 2507-88-OH; 2508-88-OH; 2509-88-OH; 2510-88-OH; 2511-88-OH; 2512-88-OH; 2513-88-OH; 2514-88-OH; 2515-88-OH; 2516-88-OH; 2517-88-OH; 2518-88-OH; 2519-88-OH; 2520-88-OH; 2521-88-OH; 2522-88-OH; 2523-88-OH; 2524-88-OH; 2525-88-OH; 2526-88-OH; 2527-88-OH; 2528-88-OH; 2529-88-OH; 2530-88-OH; 2531-88-OH; 2532-88-OH: Luciano Campomizzi, Bruno Persechini, Gary Ford, Vaverio Rizzi, Morris McGregor, Jouainc Zelsko, Sam Servello, Randy Woods, Luigi Fuca, Joseph Kaposy, John Burleigh, Roger Fulford, Trevor Wilmer, Branko Vuckovich, Chris Spillas, Gary Reeves, Kevin D. Baird, Michael Bergin, Enrico Verre, Osbourne Chambers, Dolphy Banton, Harbhajan Sandhv, John Yates, Kenneth W. Hogarth, Mike Pavlicic, M. Stolman, Stipe Bseric, Gordon Begert, Walter

Wigczorek, Emilio Attard, Barry MacLean, Lorenzo McFarlane, John H. Taylor, Michael J. Smorong, David Hall, Rocco Carnevale, Satinder Dyal, Jerry Corbett, Mike Pafundi, Sue Teepell, K. Tracey, G. Correggia, Rick Baele, Ed Luyten, Art Gilbert, Rick Scicluna, Brian Rogerson, Jose Romero, David Goode, Peter Hardy, Paul Davies, Michael Ferdinand, Vibert James, and Siegfried Bartel (Complainants) v. Ford Motor Co. of Canada Ltd. (Respondent) (*Withdrawn*)

0979-89-OH: Robert D. Cole (Complainant) v. Canada Haircloth Company Ltd. (Respondent) (*Dismissed*)

0004-90-OH: G. Ryerson (Complainant) v. H. H. Robertson Inc. (Respondent) (*Dismissed*)

0089-90-OH: Ontario English Catholic Teachers Association, Toronto Secondary Unit (Complainant) v. Metropolitan Separate School Board (Respondent) (*Withdrawn*)

1996-90-OH: Adel Chahine, Farid Chahine & Todd Gillingham (Complainant) v. Valspar Inc. (Respondent) (*Withdrawn*)

2138-90-OH: Donald C. J. Edwards (Complainant) v. Nobleton Ambulance Service (Respondent) (*Withdrawn*)

2952-90-OH: Peter Zawadowski (Applicant) v. Witco Canada Inc. (Respondent) (*Withdrawn*)

2963-90-OH: Ken Laurie (Complainant) v. Principal Heating Company Ltd. (Respondent) (*Granted*)

3248-90-OH: Wade Dennis Procter (Complainant) v. Whitler Industries Ltd. (Respondent) (*Granted*)

0017-91-OH: David Barrett (Complainant) v. National Grocers Co. Ltd. (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

2567-88-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Future Care Ltd. and Kuco Construction Ltd. (Respondents) (*Granted*)

0562-90-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Bernard Normand, B & M Millwork Ltd., and Interior Wood Installations Inc., B. J. Normand (Quebec) Ltée (Respondents) (*Dismissed*)

1382-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bondfield Construction Co. Ltd. (Respondent) (*Granted*)

1468-90-G: Labourers' International Union of North America, Local 1081 (Applicant) v. Brantco Construction Co. Ltd. (Respondent) (*Withdrawn*)

1656-90-G: Ontario Sheet Metal Workers' Conference & Sheet Metal Workers' International Association, Local 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 & 562 (Applicant) v. The Electrical Power Systems Construction Association & Ontario Hydro (Respondents) (*Granted*)

1681-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Nation Dry-wall Contractors Ltd. (Respondent) (*Withdrawn*)

1908-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. A.A.D. Management Consultants (Respondent) (*Granted*)

1993-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. 673914 Ontario Inc. o/a Imperial Carpentry (Respondent) (*Dismissed*)

2096-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Accurate Rebar Ltd. (Respondent) (*Granted*)

2583-90-G: United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. St. Thomas Acoustics & Drywall Inc. (Respondent) (*Granted*)

2617-90-G: Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Unions (Applicant) v. Par-Tex Engineering & Contracting Co. Ltd. (Respondent) (*Withdrawn*)

2668-90-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ontario Precast Concrete Manufacturers Association (Respondent) (*Granted*)

2747-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Rockwell Concrete Forming Specialists Inc. (Respondent) (*Granted*)

2940-90-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Master Clad Inc. (Respondent) (*Withdrawn*)

2944-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. 673914 Ontario Inc. c.o.b. as Imperial Carpentry (Respondent) (*Dismissed*)

2990-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. West Side Excavation Ltd. (Respondent) (*Granted*)

3014-90-G: Labourers' International Union of North America, Local 247 (Applicant) v. J. Sousa Contractor Ltd. (Respondent) (*Withdrawn*)

3039-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Fapp-Co Contractors Ltd. (Respondent) (*Granted*)

3068-90-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Beswick Electric Ltd. (Respondent) (*Granted*)

3069-90-G: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. 698304 Ontario Ltd. c/o business as Phoenix Industries (Respondent) (*Granted*)

3075-90-G: Sheet Metal Workers' International Association, Local 392 (Applicant) v. H.R. Stark (Respondent) (*Withdrawn*)

3108-90-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Norseman Drywall Ltd. (Respondent) (*Dismissed*)

3199-90-G; 3218-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. D.F.N. Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)

3213-90-G; 3214-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Malvern Drywall Systems Ltd. (Respondent) (*Withdrawn*)

3228-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Fernview Construction Ltd. (Respondent) (*Granted*)

3235-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Shelving Displays (1988) Ltd. (Respondent) (*Granted*)

3259-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Senator Homes (Respondent) (*Withdrawn*)

3262-90-G: United Brotherhood of Carpenters & Joiners of America, Local 249 (Applicant) v. Bertoia Lathing Co. Ltd. (Respondent) (*Withdrawn*)

3266-90-G; 3267-90-G; 3440-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Triple 'D' Acoustical Inc. (Respondent) (*Granted*)

3279-90-G: Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. Can-Tario Classic Marble & Tile Ltd. (Respondent) (*Granted*)

3290-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. F. Cutrona Haulage & Excavating (Respondent) (*Withdrawn*)

3303-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental (1987) Ltd. (Respondent) (*Withdrawn*)

3304-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Boon's Crane Service (Respondent) (*Dismissed*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS

June 1991



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COMMONWEALTH CONSTRUCTION COMPANY; U.A., LOCAL 508; RE MILL-WRIGHT DISTRICT COUNCIL OF ONTARIO, ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1425

Petition - Adjournment - Certification - Practice and Procedure - Witness - Petitioner testifying in-chief on first day of hearing - Petitioner not returning to be cross-examined on continuation date for "medical reasons" - Counsel unable to say when petitioner would be available - No medical report filed or diagnosis offered - Objectors' counsel seeking indefinite adjournment - Adjournment request denied - Board rejecting petition as unsupported by credible affirmative evidence as to its origination and circulation - Certificate issuing

SUMMIT FOOD DISTRIBUTORS INC.; RE TEAMSTERS UNION, LOCAL 141; RE GROUP OF EMPLOYEES

Petition - Termination - Surrounding circumstances leaving Board unpersuaded that petition supporting termination application representing voluntary wishes of all those who signed it - Application dismissed

WESTERN INVENTORY SERVICE LTD.; RE JAMES PATTERSON; RE R.W.D.S.U., LOCAL 414

Practice and Procedure - Adjournment - Certification - Petition - Witness - Petitioner testifying in-chief on first day of hearing - Petitioner not returning to be cross-examined on continuation date for "medical reasons" - Counsel unable to say when petitioner would be available - No medical report filed or diagnosis offered - Objectors' counsel seeking indefinite adjournment - Adjournment request denied - Board rejecting petition as unsupported by credible affirmative evidence as to its origination and circulation - Certificate issuing

SUMMIT FOOD DISTRIBUTORS INC.; RE TEAMSTERS UNION, LOCAL 141; RE GROUP OF EMPLOYEES

Practice and Procedure - Adjournment - Discharge - Health and Safety - Witness - Complainant seeking adjournment so that health and safety inspector might testify - Request made less than 48 hours before hearing date - No positive indication given as to when or whether witness might be available - Adjournment request dismissed - Complainant alleging that he was discharged, contrary to *Occupational Health and Safety Act*, for engaging in work refusal and arranging for Ministry inspection - Board noting that alleged work refusal and Ministry inspection took place after complainant's discharge - Complainant not discharged because he invoked procedures of *Act* - Complaint dismissed

FILTRAN MICROCIRCUITS LTD.; RE IAN WALKER

Practice and Procedure - Adjournment - First Contract Arbitration - Employer filing nothing in response to Union's application - Employer phoning Board Registrar on morning of hearing date and asking for hearing to be rescheduled - Board denying adjournment and proceeding with application - Board satisfied that employer failed to make reasonable or expeditious efforts to conclude collective agreement - First contract arbitration directed

STRATHROY CONCRETE FORMING (1988) INC.; RE L.I.U.N.A., LOCAL 1059

Practice and Procedure - Construction Industry - Evidence - Jurisdictional Dispute - Parties requesting that Board rule upon appropriate scope of area past practice evidence as preliminary matter - Board determining that industry practice evidence should be limited to ICI sector and that only evidence of work in dispute on same or similar type of machinery relevant - Board departing from general "rule" that past practice evidence be limited to the local board area - Special circumstances justifying departure including uniqueness of work

in dispute and fact that geographic jurisdiction of 2 local unions involved in complaint not congruent with either Board area or each other - Evidence of area past practice restricted to practice in Board areas 17, 19, 21 and 22 and the “white area” in between

COMMONWEALTH CONSTRUCTION COMPANY; U.A., LOCAL 508; RE MILL-WRIGHT DISTRICT COUNCIL OF ONTARIO, ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1425

Practice and Procedure - Employee Reference - Officer appointed to inquire into and report to Board on list of employees and composition of bargaining unit - Employer requesting that matter proceed to hearing rather than examinations by Officer - Request based on employer understanding that evidence will be contradictory and that credibility will be crucial - Board denying request and directing that Officer’s inquiry continue - Board ruling that issues of credibility may be dealt with, if necessary, after Officer’s report and parties’ submissions received

ACME BUILDING & CONSTRUCTION LTD.; RE U.A., LOCAL 800

Practice and Procedure - Evidence - First Contract Arbitration - Parties continuing to negotiate after union’s section 40a application - Whether Board ought to hear evidence of post-application bargaining sessions - Board concluding that negotiations which continue after a section 40a application has been filed ought not be the subject of evidence before the Board

GREAT LAKES COMMUNITY CREDIT UNION LIMITED; RE C.P.U.

Remedies - Discharge - Duty of Fair Representation - Unfair Labour Practice - Union not advancing employee’s discharge grievance to arbitration - Board concluding that union failed to conduct proper investigation, failed to have adequate representation at crucial meeting and failed to consider employee’s plausible defence to the discharge - Union acting arbitrarily - Complaint allowed - Union ordered to proceed to arbitration - Union and company ordered to constitute arbitration board without regard to collective agreement time limits

BUJALSKI, WŁODZIMIER (WALTER); RE G.M.P., LOCAL 231 (A.F. of L., C.I.O., C.L.C.); RE AMERICAN STANDARD

Representation Vote - Certification - Intimidation and Coercion - Unfair Labour Practice - Incumbent union in displacement application and individual employee requesting that new representation vote be held - Board finding various alleged campaign promises and representations not making out *prima facie* case of intimidation or coercion - Board concluding that reliability of secret ballot had not been in any meaningful way undermined - Board declining to direct new representation vote - Complaint dismissed - Certificate issuing

ATLAS SPECIALTY STEELS, A DIVISION OF SAMMI ATLAS INC.; RE C.A.W.; RE INDEPENDENT CANADIAN STEELWORKERS UNION

Termination - Conciliation - Timeliness - Termination application *prima facie* untimely as having been received by Board after the appointment of conciliation officer - Employer relying on s.113(3) of the *Act* to argue that application timely - Board ruling that s.113(3) not applying to Minister’s decision to appoint conciliation officer - Employer also arguing that appointment of conciliator a nullity because application for conciliation not served on employer as required by Ministry form - Board ruling that alleged defect in service, even if true, would not affect validity of appointment - Board also noting that alleged irregularity waived by employer’s failure to object when it first became aware of appointment - Termination application dismissed

HEVAC FIREPLACE FURNACE MANUFACTURING LTD.; RE HEVAC FIREPLACE-FURNACE; RE U.S.W.A.

Termination - Petition - Surrounding circumstances leaving Board unpersuaded that petition sup-

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porting termination application representing voluntary wishes of all those who signed it - Application dismissed

WESTERN INVENTORY SERVICE LTD.; RE JAMES PATTERSON; RE R.W.D.S.U., LOCAL 414

Timeliness - Conciliation - Termination - Termination application *prima facie* untimely as having been received by Board after the appointment of conciliation officer - Employer relying on s.113(3) of the *Act* to argue that application timely - Board ruling that s.113(3) not applying to Minister's decision to appoint conciliation officer - Employer also arguing that appointment of conciliator a nullity because application for conciliation not served on employer as required by Ministry form - Board ruling that alleged defect in service, even if true, would not affect validity of appointment - Board also noting that alleged irregularity waived by employer's failure to object when it first became aware of appointment - Termination application dismissed

HEVAC FIREPLACE FURNACE MANUFACTURING LTD.; RE HEVAC FIREPLACE-FURNACE; RE U.S.W.A.

Trade Union - Applicant requesting Board to make declaration pursuant to section 84 of the *Act* - Union receiving notice of request but making no submissions to the Board - Board directing union to forthwith file copy of its constitution and by-laws with the Board

FIELD, LISE M.; RE U.E., LOCAL 540.....

Unfair Labour Practice - Certification - Intimidation and Coercion - Representation Vote - Incumbent union in displacement application and individual employee requesting that new representation vote be held - Board finding various alleged campaign promises and representations not making out *prima facie* case of intimidation or coercion - Board concluding that reliability of secret ballot had not been in any meaningful way undermined - Board declining to direct new representation vote - Complaint dismissed - Certificate issuing

ATLAS SPECIALTY STEELS, A DIVISION OF SAMMI ATLAS INC.; RE C.A.W.; RE INDEPENDENT CANADIAN STEELWORKERS UNION

Unfair Labour Practice - Collective Agreement - Employee alleging that union violated sections 52 and 53 of the *Act* by beginning bargaining early and settling terms of new collective agreement before expiry of old one - Board holding that section 53 not prohibiting parties from bargaining early - Section 52 permitting amendments to collective agreement so long as there is no change in expiry date of agreement - Board finding nothing improper in parties negotiating replacement agreement in advance of expiry of existing one - Complaint dismissed

GUDELJ, IVAN; RE G.M.P., AFL-CIO, CLC, LOCAL 64; RE CANRON INC.....

Unfair Labour Practice - Discharge - Discharge for Union Activity - Employer refusing to allow in plant organizer to return to premises on grounds that he had quit without giving notice - Board concluding that in plant organizer had not quit - Board not satisfied that employer motivation free of anti-union considerations - Reinstatement with compensation and posting ordered

PETER GORMAN & SONS (WHOLESALE) LTD.; RE U.F.C.W., AFL, CIO, CLC.....

Unfair Labour Practice - Discharge - Duty of Fair Representation - Remedies - Union not advancing employee's discharge grievance to arbitration - Board concluding that union failed to conduct proper investigation, failed to have adequate representation at crucial meeting and failed to consider employee's plausible defence to the discharge - Union acting arbitrarily - Complaint allowed - Union ordered to proceed to arbitration - Union and com-

pany ordered to constitute arbitration board without regard to collective agreement time limits

BUJALSKI, WTODZIMIER (WALTER); RE G.M.P., LOCAL 231 (A.F. of L., C.I.O., C.L.C.); RE AMERICAN STANDARD

Unfair Labour Practice - Interference in Trade Unions - Complaint brought by individual alleging breach of section 64 of the *Act* - Complaint not demonstrating *prima facie* case for relief - Complaint dismissed

BOARD OF GOVERNORS; RE ROBERT JAMES MICALLY CLOCK #2216

Witness - Adjournment - Certification - Petition - Practice and Procedure - Petitioner testifying in-chief on first day of hearing - Petitioner not returning to be cross-examined on continuation date for "medical reasons" - Counsel unable to say when petitioner would be available - No medical report filed or diagnosis offered - Objectors' counsel seeking indefinite adjournment - Adjournment request denied - Board rejecting petition as unsupported by credible affirmative evidence as to its origination and circulation - Certificate issuing

SUMMIT FOOD DISTRIBUTORS INC.; RE TEAMSTERS UNION, LOCAL 141; RE GROUP OF EMPLOYEES

Witness - Adjournment - Discharge - Health and Safety - Practice and Procedure - Complainant seeking adjournment so that health and safety inspector might testify - Request made less than 48 hours before hearing date - No positive indication given as to when or whether witness might be available - Adjournment request dismissed - Complainant alleging that he was discharged, contrary to *Occupational Health and Safety Act*, for engaging in work refusal and arranging for Ministry inspection - Board noting that alleged work refusal and Ministry inspection took place after complainant's discharge - Complainant not discharged because he invoked procedures of *Act* - Complaint dismissed

FILTRAN MICROCIRCUITS LTD.; RE IAN WALKER

0212-91-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800, Applicant v. Acme Building & Construction Ltd., Respondent

Employee Reference - Practice and Procedure - Officer appointed to inquire into and report to Board on list of employees and composition of bargaining unit - Employer requesting that matter proceed to hearing rather than examinations by Officer - Request based on employer understanding that evidence will be contradictory and that credibility will be crucial - Board denying request and directing that Officer's inquiry continue - Board ruling that issues of credibility may be dealt with, if necessary, after Officer's report and parties' submissions received

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

DECISION OF THE BOARD; June 10, 1991

1. By decision of the Board on May 8, 1991 a Labour Relations Officer was appointed to inquire into and report to the Board on the list of employees and the composition of the bargaining unit.

2. The parties have met with a Labour Relations Officer on May 28, 1991. By letter dated May 31, 1991 counsel for the respondent wrote to the Board and requested that this matter proceed to a hearing rather than examinations by an officer. In support of this request counsel stated:

The issue seems, at this point, to be who was the employer of the employees in question. It appears to the Respondent that the issue involves more than an examination of the employees. In addition to the two employees, the Union advises that it has four witnesses. The Company, at the least at this time, intends to be calling witnesses from the sub-contractor, the bonding company, its adjuster, the project owner and project supervision. Given the extent of the additional evidence to be called, we submit that this matter would be expedited by a hearing panel of the Board. There also appears to be a significant question of credibility.

3. Subsequently, by letter dated June 5, 1991 counsel for the respondent again requested a hearing stating:

This is further to our letter of 31 May, 1991, in which we requested that this matter be listed for a hearing. It is our understanding that there will be significant contradictory evidence in this matter and that credibility of the witnesses will be crucial. Therefore it is essential in the interests of justice that the direct evidence and the cross examination of witnesses occur under oath.

4. In our view and having regard to the experience of the Board in dealing with certification applications and the issues raised in these applications (including issues similar to the ones raised in this application,) this matter would *not* be expedited by having the matter proceed directly to a hearing before a panel of the Board.

5. With respect to the assertion that there appears to be a significant question of credibility, the Board will neither interrupt nor terminate the authorization of the Board Officer to inquire into and report to the Board on the list of employees and composition of the bargaining unit to permit that issue to be brought before the Board for hearing. The potential for a credibility issue with witnesses exists in any matter where parties take opposite views, whether this be in an inquiry being conducted by a Board Officer or in a hearing before the Board. When there is an issue of credibility of witnesses testifying in a Board's Officer's inquiry, the Board usually will be able to resolve the credibility problem by scrutinizing the verbatim transcript of the Officer's proceedings, often assisted by the later oral submissions of the parties on the contents of the transcript. In the

rare instances where the Board would not be able to resolve a credibility issue, it is always open to the Board to have the witnesses brought before it for an examination of their demeanour during direct testimony before the Board.

6. The Board dealt with a similar request in its decision in *Kaneff Properties Limited*, [1980] OLRB Rep. November 1653 and in the process of so doing reviewed the statutory foundation for the Board delegating to a Board Officer the taking of evidence on issues which commonly arise in applications for certification. While the specific issue in that case which had been put to examination by a Board Officer is different from the one herein, the issue herein is equally appropriate for the evidence about it to be taken by a Board Officer. In *Kaneff, supra*, the issue of credibility arose upon cross-examination of a witness during the course of the Officer's inquiry. In the instance case, the applicant merely anticipates the problem of a credibility issue arising. In the Board's view, the reasons given by the Board in *Kaneff, supra*, for refusing to interrupt the Board Officer's inquiry and to bring the parties before the Board are equally applicable to the circumstances of the request in the instant case.

7. For these reasons the Board directs that the Labour Relations Officer's inquiry continue. The appropriate time to deal with any issues of credibility, if necessary, is after the parties have received the Labour Relations Officer's report and after the Board has received the submissions of the parties with respect thereto.

3027-90-R; 3358-90-U National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. **Atlas Specialty Steels**, a Division of Sammi Atlas Inc., Respondent v. Independent Canadian Steelworkers Union, Intervener; Independent Canadian Steelworkers Union, Complainant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Respondent

Certification - Intimidation and Coercion - Representation Vote - Unfair Labour Practice - Incumbent union in displacement application and individual employee requesting that new representation vote be held - Board finding various alleged campaign promises and representations not making out *prima facie* case of intimidation or coercion - Board concluding that reliability of secret ballot had not been in any meaningful way undermined - Board declining to direct new representation vote - Complaint dismissed - Certificate issuing

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

APPEARANCES: *L. N. Gottheil* and *W. McKay* for the applicant; *S. Shamie*, *D. McKeown* and *Bill Heath* for Atlas Specialty Steels; *Robert Reid* and *L. Gobbi* for intervener, Independent Canadian Steelworkers Union; *Barry Fitzgerald* on his own behalf.

DECISION OF THE BOARD; June 6, 1991

1. This is an application for certification in which a pre-hearing representation vote was requested and has already been taken. Certain objections to the vote had been received from the intervener, Independent Canadian Steelworkers Union ("ICSWU") and from an individual

employee, Barry Fitzgerald. This is also a section 89 complaint filed by the ICSWU, in which it alleges that the applicant CAW-Canada has breached sections 70 and 71 of the Act. Both the section 89 complaint and the objections to the vote in the certification application involve campaign events leading up to the representation vote.

2. At the conclusion of the hearing, the Board issued a short oral decision, dismissing the section 89 complaint for failure to disclose a *prima facie* case, and indicating that the Board, in the exercise of its discretion, would not be directing that a new representation vote be held in the certification application. The Board also directed that a certificate issue forthwith to the applicant. We now provide our reasons for those decisions.

3. The Independent Canadian Steelworkers Union has been the bargaining agent for the employees of the company since approximately 1943. In this certification application, the CAW-Canada has applied to displace the ICSWU as bargaining agent, and it requested that a pre-hearing representation vote be taken. Because an incumbent union had bargaining rights, the representation vote would present employees with a choice of whether they desired to continue to be represented by the ICSWU, or whether they wanted the CAW-Canada to become their bargaining agent. The campaign preceding the representation vote was heated and intense, and had a very visible presence in the work-place.

4. The vote was scheduled to be taken on March 21, 1991. On March 19, 1991, the ICSWU filed the section 89 complaint, alleging that the CAW-Canada had breached sections 70 and 71 of the Labour *Relations Act*, in that it had, on or about March 7, 1991, through the actions of an identified individual, circulated to employees of Atlas Specialty Steels, a paper entitled "ICSWU Executives' Code of Ethics". The ICSWU asserted that this paper attributed to the ICSWU executive the following view:

To keep our executive positions at all costs, this may include cheating and lying to the membership, but that's alright because they will never find out.

The complaint further alleged that the document had been distributed widely to the employees of the company and posted on company bulletin boards, all during working hours. It alleged that the information was calculated to prejudice the ICSWU in the certification application and to persuade employees to refrain from continuing to be members of the ICSWU. The ICSWU also indicated that it had attempted in writing and by word of mouth to rebut the accusations noted above. It further alleged that the statements made by the CAW-Canada were false and damaging to the ICSWU's reputation, and they were calculated to intimidate or coerce employees of the company into support for the CAW-Canada. The ICSWU asked that the pre-hearing vote scheduled for March 21, 1991 be cancelled and re-scheduled, or alternatively, that the CAW-Canada's certification application be dismissed. It also requested that the Board direct that the President of the CAW-Canada issue a public apology and withdraw the allegations contained in the circulated paper.

5. The pre-hearing representation vote was held, as scheduled, on March 21, 1991. All parties had scrutineers present during the balloting. All three signed a Certification of Conduct of Election certifying that the balloting was fairly conducted and that voters were given an opportunity to cast a secret ballot. The parties also signed the Consent and Waiver, whereby they agreed to the immediate counting of the ballots, and whereby they each waived any objection as to the regularity and sufficiency of the balloting. There was no request that the ballot box be sealed. Accordingly, the ballots were counted and the results disclosed forthwith to the parties. Although the vote was close, over fifty per cent of the ballots cast were marked in favour of the applicant CAW-Canada. The Report of the Returning Officer was posted in the work place, advising

employees that they had until April 2, 1991, to file any statement of desire to make representations with respect to the vote.

6. Subsequent to the vote and the disclosure of the results, three further documents were received by the Board. In a letter dated March 28, 1991, but received by the Board on April 4, 1991, counsel for the ICSWU forwarded additional allegations in support of the previously filed section 89 complaint. In these further allegations, the ICSU alleged that between February 26, 1991 and March 21, 1991, the grievors (the executive of the ICSWU) were dealt with by representatives of the CAW-Canada, who had distributed literature on behalf of the CAW-Canada, contrary to sections 70 and 71 of the Act, and that they did on their own and on behalf of the CAW-Canada circulate to employees a series of information bulletins indicating that "the CAW is not interested in the union funds you have accumulated" which funds were held by the ICSWU, and further stating that employees could be entitled to a refund "in this case about \$2,000.00 to each person". This literature was alleged to have been distributed widely to employees during working hours. The ICSWU asserted that the information was calculated to prejudice the ICSWU in the certification application. It alleged that the effect of the literature was to coerce employees by promises of direct financial benefit into support for the CAW-Canada, in preference to support for the ICSWU.

7. In oral submissions at the hearing, the ICSWU indicated that in fact the information bulletin dealing with the refund had been circulated to employees on February 25, 1991, and had remained in circulation after that date, and substantial discussion ensued amongst the employees about the possibility of individuals receiving \$2,000.00 each, if the CAW-Canada were to be successful in its application.

8. In addition to the section 89 complaint, two objections to the vote (statements of desire) were received by the Board. The first was filed on behalf of the ICSWU, which both challenged the reliability of the balloting and the counting of the ballots, and repeated and expanded upon the allegations contained in its section 89 complaint. The objections to the balloting were however, withdrawn at the hearing.

9. The Board also received a statement of desire from Barry Fitzgerald, an employee in the bargaining unit. Mr. Fitzgerald alleged that behaviour on the part of the CAW-Canada was improper in that it violated the seventy-two hour ban on electioneering required by law. At the hearing, Mr. Fitzgerald acknowledged that there had been no such ban in effect at the time, nor any legal requirement for one. Mr. Fitzgerald also alleged that "the CAW engaged in a campaign of deliberate deceit in that they published a bulletin, dated February 25, 1991, in which they apparently tried to buy votes with the assets of the ICSWU. There is no basis in fact to support this statement, 'the final decision is up to you, the membership, and don't let anyone tell you different.' A preceding statement led members to believe that they could receive \$2,000.00 in cash if the CAW was elected, and that is false. I further allege that the CAW bulletin, dated March 7, 1991, promises no change from the current dues structure, which is an illegal (under CAW constitution article 17, section 2) promise, in that many members of the bargaining unit would be paying less than the minimum required by the constitution. This amounts to buying votes with questionable discounts."

10. A hearing was held to deal with the section 89 complaint and the objections to the vote forwarded by the ICSWU and Mr. Fitzgerald. At the hearing, the CAW-Canada asked that both the section 89 complaint and the Statements of Desire be dismissed, in that no *prima facie* case existed, or alternatively, the Board would not in any event in the exercise of its discretion direct that a new representation vote be held. For purposes of our ruling, we have accepted as true and

provable the allegations contained in the materials filed by the ICSWU and Mr. Fitzgerald, as expanded upon them at the hearing.

11. Sections 70 and 71 of the Act read as follows:

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

71. Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.

12. The meaning of "intimidation or coercion" within the context of section 70 has been considered in a large number of prior Board decisions: see, for example *Keith MacLeod Sutherland* [1983] OLRB Rep. July 1219. In order for there to be even an arguable case for a breach of section 70, there must be intimidation or coercion of a sort which seeks to compel a person, amongst other things, to refrain from exercising any of the rights they might enjoy under the Act. There must be some force or threatened force, whether of a physical or non-physical nature. As the Board stated in *Keith McLeod Sutherland*:

..there must be a threat or other intimidating or coercive action coupled with an express or implied demand that a person (for example) refrain from exercising a right under the Act or from performing an obligation under the Act.

13. In the instant case, however, there is no suggestion that the CAW-Canada made any threats amounting to intimidation or coercion, nor for that matter that it sought to compel any person to vote a certain way, or to refrain from exercising any rights they are entitled to under the Act. Accepting the allegations as pleaded as factually correct, CAW-Canada made derogatory, perhaps defamatory, comments about executive members of the ICSWU. It also indicated that perhaps employees would benefit from the dispersal to each of \$2,000.00 from the funds in the ICSWU coffers. Neither of these statements amount to intimidation or coercion within the meaning of section 70 of the Act, nor do they seek in any fashion to interfere with the exercise of a person's rights under the Act.

14. For these reasons, the Board was satisfied that the ICSWU had not made out a *prima facie* case for any breach of section 70 of the Act, and the complaint was dismissed in that respect.

15. Insofar as section 71 is concerned, on its very wording, that section does not prohibit a union from attempting at the work place, during working hours, to engage in an election campaign or otherwise try to influence employee wishes with respect to union representation. Nothing in the allegations suggests in any fashion that the CAW-Canada might have breached section 71 of the Act. Accordingly, the complaint pursuant to section 71 was also dismissed.

16. Turning to the statements objecting to the vote, again, for purposes of our decision, we accept as true and provable the allegations contained in the representations filed by the ICSWU and Mr. Fitzgerald. The Board has commented in a large number of cases on the approach it takes in these circumstances. We do not intend to repeat most of the cases referred to the Board by the parties, as they amount generally to a paraphrasing of the same issue.

17. In *Crock & Block Restaurant* [1984] OLRB Rep. Jan. 19, at paragraph 8 therein, the Board recorded its oral ruling declining to direct a new representation vote:

• • •

Indusmin Limited, [1982] OLRB Rep. Nov. 1641 sets out the Board's jurisprudence on representation vote propaganda and the degree to which the Board will respond to inaccurate or misleading propaganda by ordering a second vote. Reference may also be made to the yet unreported decision of the Board dated October 26, 1983 in *Vogue Brassiere Limited*, Board File #0646-83-R.

As those decisions indicate, the Board does not normally interfere with a vote preceded by propaganda which is speculative, exaggerated, misleading or even false. The Board recognizes that in representation votes as in other electoral processes voters must be presumed capable of assessing critically the conflicting arguments often presented by the interests which compete for their votes.

In our unanimous view, the statements here attributed to the union's representatives are not of such a nature that the critical faculties of employee voters would have been overpowered.

We conclude, therefore, that we would not order a new vote even if the applicant proved all she has alleged.

18. In *Concorde Metal Stampings* [1987] OLRB Rep. Jan. 34, the Board made the following comments:

30. ... Where the applicant union, as an institution, suggests that employees will be penalized because of the free exercise of their franchise, the Board may also be inclined to intervene. However, where the allegations concern friction between rank and file employees, the effective administration of the Act and the achievement of its objectives requires a recognition of the fact that for some employees, union representation can be a volatile and emotional issue. Debate may degenerate into bad feelings, ruined friendship and recriminations. While the Board always has the authority to set aside a representation vote and order a new one, that is not a neutral decision, nor one which should be lightly taken and in our view should not be taken unless the occurrences are so serious and pervasive as to render improbable a reliable expression of employee wishes despite the sanctity of the ballot box.

• • •

32. ... But, by the same token, if union opponents propose to challenge a secret ballot vote on the basis of a "pervasive atmosphere of intimidation" which renders its results unreliable, citing individual incidents which occurred in the weeks or months preceding the vote, they must raise their concerns in a timely manner or risk the inference that they are reacting to the outcome of the vote rather than the allegedly negative atmosphere in which it was conducted.

19. And finally in *Northfield Metal Products Ltd.* [1989] OLRB Rep. Jan. 57, the Board set out the oral decision it had given at the hearing as follows:

3. ... The Board is of the unanimous view that no evidence need be heard as the allegations, on the assumption they are true, would not lead us to grant a new vote. The test as applied by the Board is whether or not the actions complained of are coercive or destroy the secrecy of the ballot. The test is not based on the most gullible or the most firm voter, but the reasonable voter who is possessed of critical faculties and the ability to assess issues and inquire on his or her own behalf.

20. Whichever phrasing one prefers, the essential approach and concern remain the same. A new representation vote will not be directed unless the circumstances were such that the Board concludes that, despite the secrecy and reliability of the ballot box, the vote was not likely to have been a reliable expression of the employees' wishes. Here, the reliability of the secret ballot has not been in any meaningful way undermined.

21. There are essentially three occurrences of which complaint is made. The first relates to

the bulletin published by the CAW-Canada in which it indicated that it was not interested in the union funds that the ICSWU had accumulated. The bulletin indicated that if the CAW-Canada was successful in the representation vote, employees might be entitled to a refund of approximately \$2,000.00 each from these moneys. This information was given to employees on February 25, 1991, a little over three weeks before the representation vote was held. During this period, the ICSWU itself provided information responding to this statement. There was ample opportunity for employees to evaluate the positions of the candidates, and to freely exercise their choice as they saw fit. Even assuming, as we have for purposes of our ruling, that the information was circulated by the CAW-Canada in an attempt to prejudice the ICSWU in the election campaign, there is nothing in the statement which would interfere with the reliability and sanctity of the representation vote. Campaign promises and representations are the very substance of election campaigns. Employees had ample time and information on which to assess how they ought to vote.

22. The second incident complained of was the circulation by an individual, on behalf of the CAW-Canada, of a paper in the work place which made disparaging and untrue comments about members of the executive of the ICSWU. This document was circulated on March 7, 1991, two weeks before the representation vote was held. The Board does not condone the circulation of such materials. But however unfortunate, exaggerations, misrepresentations, verbal attacks, scurrilous comments, unbelievable promises, and inflammatory rhetoric form part of election campaigns. They are the sorts of statements and tactics that employees are able to evaluate and place in perspective. The statements in the instant case were not of a nature that would interfere with or undermine the efficacy of the secret ballot representation vote. This incident occurred two weeks before the vote was held, with ample opportunity again for all employees to investigate and inform themselves of the true state of affairs. The ICSWU had represented employees in this bargaining unit for approximately 38 years. A statement made by someone on behalf of the raiding union, calling the ICSWU executive cheaters and liars, two weeks before the election was held, would not impair the ability of employees to freely exercise their vote, nor interfere with the reliability and sanctity of the ballot box.

23. With respect to the third incident, Mr. Fitzgerald alleged that the CAW-Canada bulletin of March 7, 1991 promised no change from the current dues structure, and such a promise was illegal under the CAW constitution. Whether or not such a promise would be illegal under the CAW constitution is not of particular assistance. The question for the Board is the likely effect of such a promise on employees. A promise not to raise dues in no way would interfere with an employee's ability to freely choose how to vote.

24. For these reasons, the Board ruled orally at the conclusion of the hearing that it would not direct a new representation vote, or provide the other remedial relief requested, and indicated that a certificate would issue forthwith to the applicant.

0832-91-U Robert James Mically Clock #2216, Complainant v. Board of Governors, Respondent

Interference in Trade Unions - Unfair Labour Practice - Complaint brought by individual alleging breach of section 64 of the Act - Complaint not demonstrating *prima facie* case for relief - Complaint dismissed

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members J. A. Rundle and J. Redshaw.

DECISION OF THE BOARD; June 13, 1991

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent employer had contravened section 64 of the Act. Section 64 reads as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

2. Section 64 is designed to protect the *institutional rights* of a trade union not the *personal rights* of individual employees. Indeed, the Board has held that a complaint alleging interference with the trade union must be brought by the trade union concerned and not an individual employee. (see *T. I. A. Limousine Operators*, [1979] OLRB Rep. Aug. 810, and *Dufferin Aggregates*, [1983] OLRB Rep. July 1031). This complaint is not only brought by an individual seeking to assert trade union rights, but, in addition, nowhere in the complaint is there any suggestion that the complainant has been discharged or discriminated against *because of his trade union activity*.

3. It may be that the complainant has been dealt with "*unjustly*"; however, that is generally a matter to be pursued under the terms of any collective agreement by which he is bound. Unjust treatment, in itself, is not an unfair labour practice.

4. For the foregoing reasons, this complaint is dismissed, because it does not demonstrate a *prima facie* case for relief. This dismissal is, however, without prejudice to the complainant's right to file a new complaint alleging a breach of a section applicable to him, provided that such complaint fully sets out the details of the Acts or omissions complained of. Similarly, nothing in this decision should be construed as foreclosing any right which the complainant may have to file a grievance under any collective agreement which may be applicable to him.

2466-90-U Bujalski Wtodzimier (Walter), Complainant v. Glass, Molders, Pottery, Plastics and Allied Workers International Union - Local 231 (A.F. of L., C.I.O., C.L.C.), Respondent v. American Standard, Intervener

Discharge - Duty of Fair Representation - Remedies - Unfair Labour Practice - Union not advancing employee's discharge grievance to arbitration - Board concluding that union failed to conduct proper investigation, failed to have adequate representation at crucial meeting and failed to consider employee's plausible defence to the discharge - Union acting arbitrarily - Complaint allowed - Union ordered to proceed to arbitration - Union and company ordered to constitute arbitration board without regard to collective agreement time limits

BEFORE: *Paula Knopf*, Vice-Chair, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

APPEARANCES: *Bujalski Wtodzimier* appearing on his own behalf; *Carl Hamilton*, *F. Peluso*, *F. Assisi* and *M. Kordic* for the respondent; *John Rushton* and *Salvatore DiBella* for the intervener.

DECISION OF PAULA KNOPF, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG;
June 24, 1991

1. Although not originally named as respondent, the union was given notice of the proceedings. At the outset, the union and all parties indicated that they wished to proceed on the date designated for hearing. Mr. Bujalski was offered the services of a translator and chose to proceed without one. All parties indicated their desire to proceed with the hearing as scheduled and so the matter progressed to hearing.

2. Accordingly, the style of cause is amended to include the Glass, Molders, Pottery, Plastics and Allied Workers International Union - Local 231 (A.F. of L., C.I.O., C.L.C.) as respondent and American Standard as intervener.

3. This is a case that essentially involves an allegation of a violation of section 68 of the Act. In a nutshell, the complainant alleges that the union failed to properly represent him after he was discharged from employment by American Standard. The complaint also involved an allegation of a violation of section 72(1). Except as specified below, there is no significant dispute over the essential facts.

4. Mr. Bujalski had four and a half years' seniority with this company. He worked as a spray painter, spraying large pieces such as sinks and bathtubs. His last day of work was Saturday, March 10, 1990. He was scheduled to resume work the following Tuesday. Instead, the day before, he received a telephone call from his foreman advising him to appear in the company's office prior to the commencement of his regular shift. When he arrived on the company's premises, Mr. Bujalski was met by two members of his union, the President Ajit Walia and the Financial Secretary Matt Kordic. Together they went to the office of the foreman. The foreman then questioned Mr. Bujalski on whether the report sheets and time sheets he had filled out for the previous Saturday were correct. When Mr. Bujalski indicated that the reports were correct the foreman advised that Mr. Bujalski was suspended for "over-booking". Over-booking is understood by Mr. Bujalski to involve reporting or signing for completion of more work than was actually done by him. Over-booking is understood by the company to mean signing for or reporting more work than was actually done by an individual on the day in question. In any case, the company considers both to be improper. Mr. Bujalski did not feel he had done anything wrong because it was his understanding that employees were allowed to, and indeed encouraged to, maintain an even flow of reported

work by “banking” production done on earlier days so long as the work was actually done by the employee in question.

5. In any event, Mr. Bujalski did not feel that he had done anything wrong. On the other hand, the company concluded that an audit had revealed serious impropriety and suspended Mr. Bujalski “pending investigation”. Mr. Bujalski admits that even at that stage the union “really didn’t know what was happening” and the union advised Mr. Bujalski that they would be back in touch with him.

6. Unknown to Mr. Bujalski at the time, the union then began to conduct what it considered its own independent investigation of the allegations. They were aware of the discrepancies the company were alleging against Mr. Bujalski’s reporting and some attempt was made to compare Mr. Bujalski’s report with the batches of work contained in the company’s truck. This did not yield any favorable results for the union or the complainant. By the Friday of the week of this suspension, Mr. Bujalski had not heard from the union or the company regarding the suspension. He was anxious to know the results of the investigation and anxious about being out of work considering his obligations to support his family. Hence, he phoned the company to ask what the status of the investigation was at that point. Within a few hours of this phone call, he received calls back from both the personnel manager of the company and the union indicating that a meeting had been set up for four o’clock that day, being Friday, March 15.

7. Mr. Bujalski then met three members of his union in the cafeteria prior to meeting with management on Friday, March 15. The three union representatives were Mr. Ajit Walia, Mr. Peluso and Mr. Kordic. The union claims a further person, a Mr. Silwa, Mr. Bujalski’s department steward, was also present at that meeting, however, the union offered no direct evidence of this. Mr. Bujalski adamantly denies this and instead asserts that he had asked for Mr. Silwa’s presence or the presence of his department steward and had been denied this. In any event, there was some discussion between Mr. Bujalski and his union’s grievance committee prior to the meeting with management. Mr. Bujalski claims that he was not asked any questions by his union committee or given much of an opportunity to explain his situation to them. The union witnesses deny this, saying he was given every opportunity. In any event, it is clear that they all went into the meeting together where they met several representatives of management. At that meeting management produced an audit sheet showing the alleged discrepancies to the union and to Mr. Bujalski. He tried, to the best of his ability to explain the discrepancies to management and feels that he was not given a full enough opportunity to do this. On the other hand, the union claims that Mr. Bujalski spoke too much and was given ample opportunity to explain things away. What is clear is that after this meeting, the president of the union and Mr. Bujalski spoke together. Mr. Bujalski understood that the union was taking the position that they needed more information because confusion had resulted from this Friday evening meeting. Mr. Bujalski understood that Mr. Ajit Walia would be calling him to arrange to get further information.

8. However, the next information Mr. Bujalski received was a letter dated March 20, 1990 from American Standard indicating that his employment had been terminated as of that day as a result of a “random audit” indicating what the company considered to be over-booking. Mr. Bujalski describes feeling shocked at receiving the letter of termination. He immediately contacted the union and the union agreed to file a grievance on his behalf. This was done. Mr. Bujalski then again began to wait to hear from the company or the union regarding his grievance. Mr. Bujalski pressured the union and the company about the processing of the grievance. A grievance meeting was then scheduled. Mr. Bujalski met with the union’s grievance committee and Mr. Carl Hamilton, a staff representative of the International union. They all met together prior to the grievance meeting. Mr. Hamilton questioned Mr. Bujalski about the situation. The parties’ evidence differs

as to the details of this meeting in the cafeteria. However, certain critical matters are not disputed. First, it is clear that Mr. Bujalski admitted to Mr. Hamilton that some of the work that he had signed to have done on the last Saturday at work had indeed been done earlier, but that Mr. Bujalski considered this to be consistent with the company's expectations. Secondly, Mr. Hamilton advised Mr. Bujalski that Mr. Hamilton intended to speak for Mr. Bujalski at the grievance hearing and warned him "if you open your mouth, I will leave the meeting". It was clearly the union's intention to gather whatever information possible at the grievance meeting and to see if the company could prove its case rather than attempting to persuade the company of any innocence.

9. At the grievance meeting, the company was concerned only about getting Mr. Bujalski to admit that the report he had filled out on Saturday was accurate. Once Mr. Bujalski admitted or claimed that the report was accurate, the company seemed to think that there was nothing more to the case. The meeting did not result in any satisfactory resolution between the parties. After the meeting, Mr. Hamilton instructed the President of the union, Ajit Walia, to be in touch with Mr. Bujalski about another meeting to gather further information. Mr. Bujalski was quite concerned about the conduct of proceedings thus far. He questioned why the department steward had not been present at either of the past two meetings because he felt that the company had successfully confused the union committee who were not familiar with the workings of the particular department. None of these things were resolved and again it was simply left on the basis that the union president would be in touch with Mr. Bujalski. In any event, Mr. Bujalski then left the workplace.

10. The union committee immediately thereafter sat down together to decide what if anything further would be done on the case. On the basis of the evidence that the committee had seen in the possession of the company in terms of the audit and given Mr. Bujalski's admission or statement to the company that his production report on his last day of work was accurate, whereas the audit showed otherwise, the union grievance committee came to the determination that the company had an "overwhelming" case against Mr. Bujalski and that there were no chances of success at an arbitration. They recommended to the staff representative, Carl Hamilton, that the grievance not be taken to arbitration. That became the decision of the union. Mr. Ajit Walia was instructed to advise Mr. Bujalski of this. Mr. Hamilton prepared a letter dated April 17, 1990 directed to Mr. Bujalski advising him of this decision. However, Mr. Bujalski's evidence is that he never received such a letter and there is no reason to disbelieve him on this point. Further, the union's evidence seems to indicate that the letter was prepared by Mr. Hamilton and sent to the Local President, Ajit Walia, for forwarding on to Mr. Bujalski. However, Mr. Walia died suddenly in December of 1990. Although a copy of this letter was found in Mr. Walia's belongings, there is no indication that a copy was ever forwarded on to Mr. Bujalski.

11. Much of the complaint is based upon Mr. Bujalski's contention that his method of work was both counselled and sanctioned by his foreman. The complainant distinguished the concepts of "banking" production from "overbooking production." He claims that the union neither investigated or pursued the issue that his practice of "banking" would amount to a defense in a discharge arbitration.

12. In any event, Mr. Bujalski describes being in a situation of having no knowledge of either the union or the company's decision after the first grievance meeting. After some months passed after the March meeting, he was in touch with the Company President, Mr. Walia and then Mr. Hamilton seeking information. It was through these phone calls that he was told that the union had decided not to proceed and that Mr. Bujalski could, if he chose, pursue the matter on his own. Thus he brought his complaint to the Labour Relations Board.

13. In response to this complaint, the union's evidence and argument was tendered to

establish that everything done in this case was consistent with the union's investigations and policies with regard to other complaints. Further, the union felt that because Mr. Bujalski was admitting that he had not made the pieces that he had signed for on his last day of work and given the company's audit, they had no chance of succeeding at arbitration. The union considered this to be a situation of over-booking which the Financial Secretary, Mr. Peluso, described as being one you "never win". Further, the union disputes Mr. Bujalski's claim that he was never given an opportunity to explain to either the union or the company about the situation. To the contrary, the union's evidence was that the union did everything possible to keep Mr. Bujalski calm and under control at all the meetings. Mr. Peluso said that Mr. Bujalski "got any kind of chance [to talk and explain] but the only problem with Walter was that he never stopped talking".

14. The position of the company was that whether Mr. Bujalski was either over-booking his work or improperly reporting as a result of "banking" work he had done previously, either is unacceptable and cause for discharge. The company alleges that that was why he was discharged in this situation and that he was given every opportunity to explain his actions with the assistance of the union.

The Decision

15. As originally framed, this complaint alleged not only a breach of section 68 of the Act, but also an allegation of violation of section 72(1) of the Act in that Mr. Bujalski's perception was that the company and the union had worked together to deny him his rights and ensure his termination. It is important to state at the outset that there was absolutely no evidence to support such an allegation, and no such implication can be drawn from the evidence. Hence there is no finding of a violation of section 72(1) of the Act. Instead, we must now explore whether the allegation of violation of section 68 of the Act can be sustained. Section 68 provides as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

There is no evidence of bad faith in this case. Mr. Bujalski did mention that he believed the union may have been motivated in their conduct as a result of his Polish nationality. However, there is no evidence to sustain any finding of discrimination by the union. The only real issue in the case is whether or not the union has acted in an arbitrary manner in the way it has conducted itself with regard to Mr. Bujalski's situation. This allegation must be explored in further detail.

16. Numerous decisions by this Board have explored the meaning of the term "arbitrary" in section 68 of the Act. The Board has concluded that this does not impose a standard of negligence or a standard of excellence upon unions. Instead, it creates a standard demanding that unions act in a manner that is caring and non-capricious with regard to the representation and conduct of investigations on behalf of its members.

17. With that in mind, we must look at how the union conducted itself in this case. When this is done, several serious areas of concern become evident. First, the grievor is a gentleman with four and a half years' seniority in this workplace. The union was advised at the outset that the company was investigating Mr. Bujalski for a serious disciplinary matter, that he was under suspension and that discharge could be imminent. Mr. Bujalski requested and suggested that his department steward be present at the initial meetings with the company because Mr. Bujalski believed that the union representatives present did not understand the particular workings of that department. The union failed to have the shop steward present despite these requests.

18. Further, the union claims to have responded to the information received by the company by conducting its own investigation to determine the accuracy of the company's audit. The union witnesses described going to check a truck where the grievor's work ought to have been. However, the grievor alleges, and the union does not dispute, that the union's investigation did not include a questioning of the grievor about any of the details of the audit. Indeed, the details of the audit were never put to the grievor by the union although those details were made available to the union. There is great substance to Mr. Bujalski's wonderment about how the union could possibly conduct an investigation on his behalf when the union failed to question him directly about these details.

19. A further area of concern is the union's failure to give Mr. Bujalski notification of its decision not to take the matter to arbitration. While it is clear that the union's international representative, Mr. Hamilton, realized the necessity of giving this advice to Mr. Bujalski and intended that information to be passed on to him, the uncontradicted evidence is that Mr. Bujalski was not informed. Further, he was given no advice as to whether or not he had a right to appeal or challenge this decision or to proceed with any other avenue of redress either against the union or the company. A further element of concern is the fact that the president of the union advised Mr. Bujalski after the third meeting with management that the union would be back in touch with Mr. Bujalski to seek further information and clarification regarding the audit and allegations against him. Mr. Bujalski was then advised to go home by the union. However, the union executive committee immediately then decided not to proceed with arbitration. If indeed they needed further evidence to clarify matters, they should have solicited this evidence for clarification prior to embarking on a decision as to whether or not to proceed to arbitration. Alternatively, if they intended to make such a critical determination upon the grievor's situation, they ought to have advised him of their intention to do so and allowed him to make representations to them on this matter.

20. It is true that the union did conduct an investigation of sorts. It is also true that they inquired of Mr. Bujalski as to his position on the case and the union came to a good faith conclusion that there was no sense in proceeding forward on an arbitration that they had no chance of winning. However, we still must conclude that there has been a violation of section 68 of the Act. The union failed to conduct a full or proper investigation, it failed to ask critical questions or seek critical information from Mr. Bujalski. It failed to have adequate representation in the form of a departmental steward at critical meetings and it made the crucial decision not to proceed to arbitration without having all the necessary available evidence or submissions before such a decision is made. The result of all this is the critical fact that the union's faulty investigation deprived the complainant of the opportunity to have his plausible defense considered. The union never did consider the complainant's contention that his actions conformed in with management directives or orders. Unions are not to be faulted under section 68 for simply making investigative mistakes. But where a discharged employee raises a serious or plausible defense to a discharge, the union is obliged to investigate the defense and raise it with the company during the grievance procedure. Otherwise it cannot be said that the union has fulfilled its duty of fair representation of its member. In the case at hand, the union's failure to discuss the allegations fully with the complainant and its failure to investigate his position and consider it with management must be considered to be arbitrary behavior. By acting in such a manner, we are forced to conclude that the union has acted in a manner that must be considered as arbitrary or capricious and heedless of the rights of Mr. Bujalski. Thus, the union must be found to be in violation of section 68 of the Act.

21. However, before turning to the question of remedy, one other matter is worthy of note. Part of Mr. Bujalski's complaint against the union was with regard to the International representative's threat or warning to Mr. Bujalski to remain quiet during the grievance meeting or risk the

representative leaving the meeting. Mr. Bujalski certainly took great offense to this and considered it as one of the foundations of the section 68 complaint. However, the evidence is convincing to this Board that the union took this position to protect Mr. Bujalski and to try to prevent him from saying anything at the grievance meeting that the company would later use against him in evidence if the matter proceeded to arbitration. The Board appreciates the wisdom of this strategy and notes that it may often be in a grievor's best interest to remain silent at a grievance meeting and that a union may be dispensing wise advice in ensuring that the grievor remain silent. Thus, we do not consider that this aspect of the evidence discloses any violation of section 68.

22. In conclusion, the totality of the evidence convinces us that the union has failed to live up to the standards of the duty of representation imposed by section 68 of the Act. Thus, we declare that the union has violated section 68 of the Act. We order that the union immediately take steps to proceed with this matter to arbitration. We order that the company and the union take the appropriate steps to constitute a board of arbitration forthwith without regard to the time limits in the collective agreement. The Board remains seized with the matter should there be any difficulties with regard to the implementation of our order.

DECISION OF BOARD MEMBER W. H. WIGHTMAN; June 24, 1991

1. As mentioned at paragraphs 14 and 15 of the majority decision, the Board has been circumspect in its interpretation of section 68 and, in particular, in making a finding of "arbitrariness" with respect to union conduct lest its decisions have the effect of imposing unrealistic standards of performance on *bone fide* unions. This circumspection on the part of the Board merely recognizes that lack of resources, a small membership thinly dispersed over a wide geographic area, or other legitimate considerations not within its control could make it impossible for a given union to meet too stringent a standard. Moreover, even well financed unions, as private voluntary associations of individuals, should be allowed wide discretion in determining internal organization, policies and procedures without undue interference on the part of the state or other third parties.

2. If the standards are set too strictly unions will be faced with a Hobson's choice of either taking even the most specious of complaints through arbitration or defending themselves against a multitude of section 68 complaints before this Board. The prospect of a substantial increase in the volume of purposeless litigation was a concern which both labour *and* management raised when legislators were attempting to give expression to the obligation of unions to fairly represent each and every member. If this obligation, or duty, was to be incorporated into the *Labour Relations Act* then clearly the competing concerns would require carefully balanced interpretation.

3. I dissent with the majority in the findings expressed at paragraph 19 on the grounds that they broaden the definition of "arbitrary" in a section 68 context, thus leading to the undue diversion of union resources from actions pursuant to their members rights and interests, to actions in defense of the institution itself. Such an outcome does not serve any definition of good labour management relations.

4. My reasons for dissenting from the majority findings at paragraph 19 are as follows:

1. The complainant asserts, and the majority agree, that one of two specific departmental stewards should have been present at critical meetings, and the majority concludes as a consequence of this omission the union "failed to have adequate representation".

Recalling the unanimous findings that there was neither a conspiracy nor bad faith involved, it is important to note that the President and Financial Secretary, as well as an International Represen-

tative of the union, were involved jointly and severally in the meetings and decision-making. While it is open to the complainant to argue that the involvement of either of the two stewards would have enhanced his case and produced a different outcome, that is a purely subjective assessment. I feel the Board goes too far in concluding the officers who were involved were either lacking in capacity to deal with the matter or remiss to the point of violating the *Act* by not calling in one of the stewards identified by the complainant.

2. The majority find that the union "failed to conduct a full and proper investigation, it failed to ask critical questions or seek critical information from (the complainant).

• • •

.....(and) it made the crucial decision not to proceed to arbitration without having all the necessary available evidence or submissions..."

The Board heard evidence regarding the several meetings and discussions in which at various times the complainant, the local union officers, the international representative and company officers were involved. What might or might not ultimately prove to be critical in terms of questions, information, evidence or submissions would only be determined by an arbitrator, not the Board. In my view, for the purposes of section 68, the important evidence is not how well the union officials went about their task but that they did so to the best of their abilities and with the best interest of the complainant in mind. The majority indicate acceptance of the union's good faith by acknowledging that even the international representative's harsh admonishment to the complainant not to speak during the meeting with company officials was given forcefully out of a concern for the complainant's interests.

5. If labour and management are to find accommodative solutions and a long term *modus vivendi*, one necessary ingredient is acceptance of the fact that human errors in the form of mistakes and miscalculations will occur from time to time. How the parties of interest deal with such errors is for them to decide in the context of their relationship. A further necessary ingredient of good labour/management relations is for labour and management to be able to know with a reasonable degree of certainty that an agreement is in fact an agreement and that a "deal is a deal". Employers, no less than unions, are entitled to know that a matter once resolved by agreement with responsible union officials is indeed resolved. If interpretations of the now codified duty of fair representation have as their effect the introduction of uncertainty as to the ability of the union to deliver on its undertakings the prospect of a good working relationship between the parties is at considerable risk. They should not be required to look over their shoulders for state approval, nor would I think it in the interest of good labour relations that union officials feel compelled to seek a legal opinion as to what factors entering their decisions in monitoring collective agreements might prove critical in the eyes of this or other tribunals as long as their decisions are taken in good faith.

6. I doubt the complainant advanced the contention to union officers that he had been "both counselled and sanctioned by his foreman" (to record work as he did) with the same clarity as that theory of the case appears in paragraph 11 of the majority decision. Thus the decision leaves unions in the position of not knowing whether a "defense", suggested at a stage when the union is deciding whether or not to proceed to arbitration, may not be "perfected" by the time it comes to hearing before the Board.

7. I would have found that these union officials met the good faith test and I would have dismissed the complaint.

2664-89-JD Millwright District Council of Ontario, on its own behalf and on behalf of its Local 1425, Complainant v. **Commonwealth Construction Company**; United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508, Respondents

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Parties requesting that Board rule upon appropriate scope of area past practice evidence as preliminary matter - Board determining that industry practice evidence should be limited to ICI sector and that only evidence of work in dispute on same or similar type of machinery relevant - Board departing from general "rule" that past practice evidence be limited to the local board area - Special circumstances justifying departure including uniqueness of work in dispute and fact that geographic jurisdiction of 2 local unions involved in complaint not congruent with either Board area or each other - Evidence of area past practice restricted to practice in Board areas 17, 19, 21 and 22 and the "white area" in between

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

APPEARANCES: *David Watson* for the applicant; *Lawrence C. Arnold* and *Marcel Jolie* for the respondent.

DECISION OF THE BOARD; June 27, 1991

1. This is a jurisdictional dispute complaint filed pursuant to section 91 of the *Labour Relations Act* ("the Act"). For ease of reference the parties to this complaint will be referred to as the "Millwrights", "Commonwealth Construction", and "the U.A.".
2. This matter came on for hearing before this panel of the Board after a pre-hearing conference had been conducted. Although the parties were able to agree upon some matters as evidenced in the pre-hearing conference memorandum, they were unable to agree upon the geographic scope of the area past practice which is relevant and which the Board ought to admit in its adjudication of this complaint.
3. The parties requested that the Board rule upon the appropriate scope of the area past practice evidence as a preliminary matter. The parties agreed that this panel is not seized with hearing the merits of the complaint.
4. The parties are partially agreed on the description of the work in dispute. They are agreed that the work in dispute was performed on a paper making machine at St. Mary's Paper Mill in Sault Ste. Marie, Ontario. The extent of their disagreement concerning the description of the work in dispute is indicated by the wording in the brackets in the following description.

all work in connection with the removal and installation or reinstallation of (condensate), syphons, including the syphon tubes inside the dryer drums, and the rotary (steam) pressure joints in connection with the dryer rolls (and the support bracket for same) on the papermaking machine.
5. The parties have agreed that the relevant employer past practice evidence is geographically limited to the employer's practice in the Province of Ontario.

Submissions of the Parties

6. Counsel for the Millwrights has taken alternate positions with respect to the parameters of the geographic scope of the area past practice evidence. Initially, the Millwrights sought to limit the area past practice evidence to evidence of jobs within Board area 21, the Board area in which the work in dispute is situate.

7. However, as the U.A. desires to introduce evidence of a job which was performed in 1982 in Iroquois Falls (which is within Board area 19) the Millwrights are content to have the area past practice evidence include Board area 21 and 19 and the “white area” adjacent to those Board areas. The Millwrights take the position that the U.A should not be able to introduce evidence of the Iroquois Falls projects under the guise of the “skill and training” criterion rather than the “area past practice” criterion (as is anticipated) without affording the Millwrights an opportunity to adduce their own evidence with respect to the Iroquois Falls job notwithstanding the fact that the job was performed outside Board area 21. The Millwrights want to include the “white area” in order to rely upon, *inter alia*, a job performed at the E.B. Eddy Mill in Espanola which is situate in the white area just outside Board area 21.

8. The Millwrights argue that there is evidence of similar work on similar machines within the immediate area of the project at which the work in dispute was performed. It is asserted that in the past the Board has consistently limited the scope of area past practice evidence to the proximate area where the dispute arose. Conversely, the Board has consistently excluded evidence of practice not in the proximate area of the work in dispute. (See for example *Urban Consolidated Construction Corporation Ltd.*, [1977] OLRB Rep. Feb. 41, *Ontario Hydro*, [1983] OLRB Rep. June 932, *Sirotek Contractors Limited*, 1967 OLRB Rep. Aug. 479, *Beer Precast Concrete Limited*, 1970 OLRB Rep. Aug. 610, *Long Branch Window and Metal Cleaning*, [1972] OLRB Rep. Feb. 129, *Ilena Construction Company Limited*, [1974] OLRB Rep. Nov. 775, *K-Line Maintenance*. OLRB [1979] Rep. Dec. 1185, *Brunswick Drywall Limited*, [1982] OLRB Rep. Aug. 1143, *Acco Canadian Material Handling*, [1990] OLRB Rep. Sept. 915.)

9. The substance of the submissions by counsel for the Millwrights was that in the adjudication of jurisdictional dispute complaints evidence with respect to the past practice criterion inevitably takes up a significant amount of the parties’ time and money both in preparation for and in presentation of the case. Similarly, the Board must also set aside numerous hearing days to consider that evidence in order to adjudicate upon the complaint. The limitation of past practice evidence to a local board area balances the various interest of the parties to the dispute (and the Board) to have the matter determined in a timely, expeditious and cost efficient fashion. Only evidence which is relevant to the practice within a particular geographic region is heard because to extend the evidence beyond such geographic parameters would result in even lengthier hearings where the evidence of past practice would become protracted. Both time and expense therefore militate against an expanded geographic area.

10. Counsel for the Millwrights asserted that section 91 authorizes the Board to inquire into jurisdictional disputes over “*particular work*”. Unlike adjudication pursuant to section 150 of the Act to determine the sector in which work is performed, the adjudication of jurisdictional disputes is neither intended to, nor does it in fact, achieve a uniform or consistent practice with respect to the assignment of work. Counsel argues that section 91 of the Act is a method by which trade unions and employers can resolve disputes over trade jurisdiction without resorting to self help remedies. Section 91 is a means of securing industrial peace within a particular area. Counsel noted that both the nature of disputes and the means for resolving such disputes may vary from area to area. As a result the remedial relief which the Board typically grants in section 91 disputes is

restricted to the area where the dispute arose. As declaratory remedial relief is limited to a specified geographic area, the evidence of area past practice should be similarly limited. He asserts that it would be unfair to bind other areas of the province with the resolution of the jurisdictional dispute when the assignment of the work in dispute in those areas is not or has not been controversial.

11. Counsel argued that past practice evidence which extends beyond a local geographic region or area has only been admitted where there have been extenuating circumstances. He cites *Foster Wheeler*, [1989] OLRB Rep. Feb. 128 as one such circumstance and notes the unique nature of the work in that instance. He also acknowledges that extensive area past practice evidence has been admitted in jurisdictional dispute complaints outside the construction industry in circumstances where the nature of the “industry” is such that evidence extending beyond the local geographic area is warranted. He cites the line of “newspaper cases” as an example. See for example *The Kingston-Whig Standard Company Limited*, [1972] OLRB Rep. Nov. 959, *Toronto Star Newspapers*, [1980] OLRB Rep. April 565 and also *Boise Cascade Canada Ltd.*, [1983] OLRB Rep. Feb. 194.

12. Counsel argues that these cases are not applicable. In this instance the “industry” is the construction industry which has historically been organized on a localized area basis. As a result “industry practice” and “area past practice” are synonymous. He submits also that there are no extenuating circumstances which should compel the Board to depart from its usual practice of restricting past practice evidence to the proximate area where the dispute arose.

13. The U.A. asserts that the appropriate and relevant geographic area for past practice evidence is the Province of Ontario.

14. Counsel for the U.A. notes that the St. Mary’s Paper Mill is the only mill in Board Area 21. He asserts that the work in dispute is specifically defined work, performed on a specific part of a paper making machine in a paper mill. He argues that these two factors in particular favour a ruling that evidence of past practice throughout the Province of Ontario is relevant to the proper adjudication of this dispute.

15. Counsel for the U.A. submits that although in jurisdictional disputes in the construction industry past practice evidence is usually restricted to a single board area, this is not always the case. In appropriate instances, because of extenuating circumstances, the Board has limited past practice evidence to an area as small as a city (see *Brunswick Drywall Limited*, *supra* or as extended as the Province of Ontario. (See *Foster-Wheeler*, *supra*) or the territorial jurisdiction of the trade unions involved in the dispute. (See *Tilechem Limited*, [1982] OLRB Rep. July 1074.

16. Counsel submits that given the paucity of evidence that is available in Board Area 21 because the only paper mill in that Board Area is the St. Mary’s Paper Mill at Sault Ste. Marie and in view of the fact that the work in dispute is discreet and can only be performed on a papermaking machine in a paper mill, past practice evidence throughout the Province of Ontario is appropriate. He argues that there are a limited number of paper mills and these specific machines throughout the province. He submits that there is no difference between the machines or the performance of the work in dispute whether the paper mill is located in Thunder Bay, Sault Ste. Marie, Toronto, Thorold or Trenton. There is therefore no valid reason for distinguishing between the areas of the province and limiting evidence only to a particular geographic region such as a local board area.

17. Counsel for the U.A. submits that there is a difference between “industry practice” and “area practice” and a difference between what he termed as “generic” construction work and particular or specialized construction work of the type involved in this jurisdictional dispute. It was argued that where the work in dispute is or can be performed on virtually every construction site in

the province, the past practice evidence should be limited to the local board area. That would recognize the “industry practice” of the “construction industry” and in such instances “industry practice” and “area practice” are in fact synonymous.

18. On the other hand where performance of the work in dispute is confined to a particular type of work at a particular type of construction project the “industry practice” involved is only a limited portion of the construction industry. In those instances, the Board should depart from the norm in the adjudication of the jurisdictional disputes in the construction industry and permit past practice evidence within that limited construction industry on a much broader “area” basis. Counsel urged us to adopt the “industrial” or “non-construction industry” practice and admit evidence of past practice evidence throughout the province. In support counsel cites *Foster Wheeler, supra*, and the “Newspaper cases”, *supra*.

19. In support of his assertion that “industry practice” and “area practice” may be different, counsel referred to *Canada Millwrights Limited*, [1967] OLRB Rep. May 195. In that decision the Board first set out the criteria which the Board considers in determining a jurisdictional complaint:

6. Briefly then, the jurisdiction of the trade unions asserting conflicting claims as set out in their constitutions or as incorporated in and forming part of any collective agreements between themselves and the employer who is doing the work in dispute, obviously would be a factor taken into account by the Board. Any written agreements or even informal understandings between the disputing unions as to the respective areas of their work jurisdiction also would be a relevant consideration. As well, rulings, awards or decisions made by authorized individuals or tribunals relating to the same or a similar type of work assignment dispute might have an influence on the Board's determination, as would the past practice in assigning the work in question *whether it be in an area or an industry*. Finally, the nature of the work, the skills involved, safety, efficiency and economy in the performance of the work are factors that may be of significance.

[emphasis added]

20. Thereafter, in *Fraser Brace Engineering Co. Ltd.*, *supra*, the Board noted:

48. Counsel for all parties asked the Board to give further guidance as to the factors which it considers relevant in making its determinations in jurisdictional disputes. Most of the factors which the Board takes into account are set out in the *Canada Millwrights Limited Case*, O.L.R.B. Monthly Report, May 1967, p. 195. The relative importance of these various factors has been indicated in subsequent decisions. The content of the instant decision we hope affords some guidance to the parties. We would state, however, that *unless there are extenuating circumstances*, the relevant area practice is the area where the dispute arose.

[emphasis added]

21. Counsel argued that these and subsequent cases have recognized that in certain circumstances a limitation of past practice evidence to a local board area is not appropriate.

Decision

22. We agree that there is a difference between “industry” past practice and “area” past practice. In our view, “area” past practice refers to the past practice in a particular geographic area. Through the use of past practice evidence the parties provide evidence as to how other employers have assigned the work in dispute in a particular geographic area determined to be relevant.

23. A review of the cases indicates that “industry” practice generally refers to the construction industry. However, the *Act* itself and the trade unions and employers engaged in the construc-

tion industry have recognized that the construction industry has a number of different "divisions" or "sectors" as determined by "work characteristics". (See section 117(e) of the Act). Within the construction industry there may be a different "industry practice" within these various sectors. A review of the jurisdictional dispute decisions rendered by the Board indicate that it has been generally accepted (or at least not addressed in the decisions or disputed by the parties) that in the adjudication of jurisdictional dispute complaints the Board should limit the industry practice evidence to that sector or division of the construction industry in which the dispute arose. In so doing the Board and the parties implicitly acknowledge that the history of organizing in the construction industry and the work jurisdiction claimed by the trades may vary from sector to sector.

24. In *K-Line Maintenance and Construction Ltd.*, *supra*, the Board noted at page 1190:

19. The evidence before the Board establishes that the International Brotherhood of Electrical Workers recognizes that there is a line of demarcation between work performed outside property lines and work performed inside property lines. The work in dispute was performed outside property lines and in the *Clement & Bellmore Construction Limited* case, [1967] OLRB Rep. August 464, the Board recognized such a distinction.

• • •

21. The appropriate area practice for the Board to consider is the work performed outside property lines and the work performed by utilities on their own properties. The work performed inside property lines is not considered by the Board in this complaint. The Board makes this distinction on the basis that work performed inside property lines has been treated differently by the International Brotherhood of Electrical Workers, K-Line and other electrical contractors who are members of the Electrical Contractors Association of Toronto. In addition, it should not be forgotten that the work in dispute involves work performed on public property in conjunction with street lighting which is located on public property.

(See also for example *Urban Consolidated Construction Corporation Ltd.*, *supra*, where at page 47, paragraph 31 the Board explicitly refers to the area practice in the industrial, commercial and institutional sector of the construction industry).

25. Similarly in a number of instance where the issue has been specifically addressed it has been necessary to adjudicate an issue amongst the parties with respect to the sector in which the disputed work was performed *before* adjudicating upon the merits of a jurisdictional dispute complaint which had been filed. Thus, in *Dufferin Construction Co.*, [1988] OLRB Rep. Nov. 1164 at page 166 the Board stated:

8. As the Board has noted above, the parties agree that a sector determination is needed with respect to the work which is central to the issues in all three files. There is no dispute that the issue impacts on the criteria of collective bargaining relationships and area past practice which are considerations in resolving jurisdiction disputes. In the Board's view, resolution of the sector dispute is likely to impact on the relevance of the criteria of employer preference and employer past practice as well. It is the Board's further view, therefore, that, in all of the circumstances of these proceedings, it is necessary for the Board to decide the issue of whether the work in dispute in the two grievance referrals and the jurisdiction complaint comes within the ICI sector of the construction industry prior to considering any other issue relevant to the two grievance referrals and before considering the section 91 complaint.

26. In *Armbro Materials and Construction Ltd.*, [1986] OLRB Rep. May 579 the Board also stated:

7. The second preliminary issue argued before us pertains to area practice. The complainant contends that the relevant area practice to be considered in the hearing of the merits of this complaint is the practice in Board Area 18 with respect to the installation of site services on industrial, commercial and institutional ("ICI") projects. The complainant further contends that

no limit should be placed on how far back in time such evidence may go. In this regard, the complainant seeks to adduce evidence “going back to the 1940’s”. Counsel for Local 183, on the other hand, contends that the work in dispute is sewer and watermain work, and seeks to rely on area practice in respect of such work without regard to whether it was performed in connection with a residential project, a road, an industrial plant, or an electrical power system project. It is his position that the sewers and watermains sector cuts across the other sectors listed in section 117(e) of the Act, and that work in that sector is defined by the tasks associated with sewer and watermain construction, not by the location in which it is being constructed. He further contends that it would be an abuse of the Board’s process to permit evidence to be adduced concerning area practice which goes back more than five or ten years at the most.

9. ...

It is evident to us from the submissions of the parties and the contents of their pre-hearing briefs that in order to resolve the matters in dispute between the parties, including the second and third “preliminary issues” set forth above and the merits of this jurisdictional complaint, it will be necessary for the Board to determine whether the work in dispute is within the ICI sector, as contended by the complainant, or within the sewers and watermains sector, as contended by the respondents. We are further of the view that the issue of whether that work comes within the ICI sector should be determined under section 150 of the Act prior to the determination of any other issues relevant to this complaint, including the two aforementioned “preliminary issues”. In our view, this approach is likely to prove to be the most expeditious manner of proceeding, since the determination of that matter will assist in determining the relevant area practice and the applicability of the respondents’ collective agreement, and may also be of considerable assistance to the parties in resolving or narrowing this complaint.

See also *Steen Contractors Ltd.*, [1987] OLRB Rep. Jan. 137 at 138.

27. In our view, these cases confirm the proposition that in the construction industry as a whole there may be a difference in trade jurisdiction claimed by any trade union from one sector to another sector. We have therefore concluded that the criterion “industry” practice when used in the context of a jurisdictional dispute complaint in the construction industry refers to the practice within that particular sector of the construction industry in which the dispute arose. In our view, in the absence of any extenuating circumstances or compelling reasons to the contrary, industry practice should be limited to the sector in which the work in dispute arose.

28. There is no dispute that in this complaint the work in dispute falls within the ICI sector of the construction industry. Accordingly, we have determined that the industry practice evidence should be limited to that sector.

29. The parties disagree about whether the work can only be performed on a paper-making machine. The U.A. assert that is the case while the Millwrights contend that the work is not so technologically limited but is or can be performed on other types of machines. In the circumstances we consider it inappropriate to further refine or limit the “industry practice” to the work in dispute when performed on a paper-making machine in a paper-making mill.

30. We do however consider that only evidence of the work in dispute on the same or similar type of machinery is relevant. Section 91 authorizes the Board to inquire into a complaint involving the assignment of “particular work” and not “work” in the abstract. Evidence must therefore relate to the work in dispute. In this regard we concur with the decision of the Board in *Acco Canadian Material Handling*, *supra*, where the Board stated:

5. Past practice evidence is only relevant to deciding the proper assignment of work in dispute if it can be tied in with the actual work in dispute. At the same time, the scope of past practice evidence should not be so narrow as to interfere with a party’s full opportunity to present its evidence and make its submissions on the issue of the proper assignment. That raises the question of where is the sensible place to draw the line as to the past practice evidence to be heard. In the

instant proceeding, in the Board's view, limiting past practice evidence to the two types of conveyor systems was that place. This is because the two systems include a sufficient variety of conveyors which might arguably be included in the term "monorail conveyor" so as to allow the parties full opportunity to present their evidence and make their submissions respecting the conclusions to be drawn by the Board from past practice evidence.

31. Next we turn to the geographic parameters of the area past practice.

32. The primary reason why the Board limits past practice evidence to a particular geographic region which coincides with a Board area is to take into account the history of organizing in the construction industry and the work jurisdictions claimed by the craft trade unions as a result of that organization.

33. Historically, local trade unions organized employees in those geographic areas for which they had been granted territorial jurisdiction by their parent international. In turn, employers within the industry also organized their associations on a local level by forming a "Builders Exchange" or other "association" which would engage in collective bargaining on behalf of the employer contractors in the area with the local union. The geographic areas created by the Board in large part mirror the traditionally established and recognized geographic jurisdictions of the local unions. They were created after hearings about the matter had been conducted with interested and affected parties.

34. Organizing on a local level impacted on the trade jurisdiction claimed and/or asserted by local trade unions from one geographic area to another. The Board's limitation of past practice evidence to the geographic board area therefore recognized and accommodated the fact that trade jurisdiction may vary from one geographic region to another. Thus, for example, the geographically limited past practice evidence in one jurisdictional dispute complaint allowed the Board to consider and accommodate the trade jurisdiction of Bricklayers over drywall taping in the Kingston area serviced by Local 10 of the International Union of Bricklayers and Allied Craftsmen although the Bricklayers Union did not assert jurisdiction over drywall taping in any other area in the province. (See *Brunswick Drywall, supra*). Similarly, the limitation of past practice evidence to a specific geographic board area has enabled the Board to take into account the history of organization within the "forming industry" where the traditional lines of demarcation between the crafts has become blurred. (See for example the history of the form work council agreement referred to in *Urban Consolidated Construction Corporation Ltd., supra* at paragraphs 9, 10 and 11.)

35. Given the unique nature of the construction industry and the organization (by both employers and trade unions) for collective bargaining purposes within that industry on a local geographic basis, evidence of past practice in other local geographic areas is generally not relevant. It could perhaps be said that past practice evidence in other local areas is "arguably" relevant because it deals with what loosely may be termed as "similar facts". That is true however of evidence of almost any construction project in the province and perhaps beyond.

36. In jurisdictional dispute complaints in the construction industry past practice evidence is almost limitless. Taken to its logical extreme, any party could seek to introduce *viva voce* evidence of each and every construction project at which the work in dispute or work arguably analogous to the work in dispute had been performed. The Board must draw a sensible line of what is relevant to the proper adjudication of the issues in dispute somewhere.

37. The statutory provisions which govern the admission of evidence by the Board (see for example sections 102(13) and 103(2(c)) of the Act and section 15 of the Statutory Powers Procedure Act) and the rules of natural justice compel the Board to hear relevant evidence. These statutory provisions however do not require the Board to hear evidence which is merely "arguably relevant"

especially where the limited value of that evidence is far outweighed by the time and expense which would occur if the parties were to embark on adducing such additional evidence which is only collateral to the issues in dispute.

38. The value of section 91 as a means of achieving industrial peace in the construction industry is seriously undermined when the resolution of jurisdictional dispute complaints take months or even years of expensive litigation to resolve. In order for section 91 to be an effective alternative to jurisdictional work stoppages, jurisdictional dispute complaints before the Board should not become costly and lengthy adjudicative proceedings. The resolution of jurisdictional dispute complaints will become even lengthier and more costly if the parties and the Board embark on these collateral avenues - avenues of evidence which ultimately can have little, if any, impact upon the issue in dispute before the Board.

39. If the area practice is *not* different from one geographic board area to another the factors of cost and expedition militate against the admission of unduly repetitious evidence from other parts of the province which “confirm” the local area past practice. The value of such evidence in such instances is far outweighed by the rights of the parties to have the dispute resolved in a less costly more expeditious fashion. In that instance evidence of past practice is, at best, collateral to the issue before the Board which is the assignment of particular work in a particular geographic location.

40. If the area past practice *is* different in the geographic board area in which the dispute arose it is this very difference which supports limiting the past practice evidence to the local board area. In light of the history of organization of the trade union(s) at a local level, evidence of how other locals and/or other contractors in other areas have dealt with the disputed work assignment is not relevant. That type of evidence doesn’t address the issue in dispute before the Board namely how have the local trade unions (and local contractors) organized and/or assigned and claimed/asserted trade jurisdiction over the work in dispute. It makes little labour relation sense “to disturb what [may be] a successful and long-lived work jurisdiction the exercise of which has caused no industrial unrest.” (See *Brunswick Drywall*, *supra* at page 1146) merely because a local trade union has established a trade jurisdiction which may, at first blush, appear to be anomalous.

41. For these reasons we are of the view that the Board should not lightly depart from its general practice to limit past practice evidence to the area where the dispute arose.

42. We must be cognizant however that special circumstances may warrant a particular panel of the Board from departing from this general “rule” that past practice evidence be limited to a board area. Although the Board’s general rules and policies provide a measure of guidance, certainty and stability in the labour relations community, its rules and policies are not, and cannot be, “carved in stone”. The Board must be flexible and responsive to extenuating circumstances which require a departure from its usual or “normal” policies.

43. We view this case as consisting of such special or extenuating circumstances for two reasons.

44. The work in dispute is somewhat unique. It is very particular work performed, at best, on a limited number or type of machine. The work is not common place and the parties are agreed that, if past practice evidence is limited to Board area 21 the only evidence available is the past practice at the *St. Mary’s Paper Mill* in Sault Ste. Marie. Although area past practice is only one factor in determining a work assignment, it is undoubtedly an important one. In our view, the paucity of past practice evidence in Board area 21 warrants an expanded geographic scope. In order to properly adjudicate upon this complaint and provide the parties with full opportunity to make their

submissions with respect to the proper assignment, the Board and the parties should have the benefit of evidence as to how the same or similar work has been assigned in a broader geographic area.

45. Equally important however is the fact that the geographic jurisdictions of the two local unions directly involved in this complaint are not congruent with either the Board area or each other.

46. The geographic jurisdiction of the Millwrights consists generally of Board areas 17, 19 and 21 and the white areas adjacent thereto. The geographic jurisdiction of the U.A. on the other hand consists essentially of a part of Board area 21 and a portion of Board area 22. The area where the two unions overlap is only a portion of their total geographic jurisdiction.

47. Having regard to the fact that trade union organization within the construction industry has traditionally occurred at a local level, and the consequent claims over work jurisdictions which have developed in local geographic areas as a result of that organization, we consider it appropriate and relevant that past practice evidence include work assignments within the geographic area over which each local has jurisdiction. In that way the parties can adduce relevant evidence regarding their approach to or claim over similar work within "their" geographic jurisdiction in the past.

48. Having regard to,

- (1) the territorial jurisdiction of the two local unions directly involved in this complaint (and therefore allowing for the fact that the history of organizing and the consequent claims over work jurisdictions may vary from area to area), and
- (2) the cost and delay which would result if the Board permitted "arguably relevant" which, in the circumstances can only be collateral to the issues in dispute to be adduced,

we are of the view that area past practice should be restricted to evidence of past practice in Board areas 17, 19, 21 and 22 and the "white area" in between. That geographic region will give the parties a number of projects upon which each can adduce evidence, and will provide both the parties and the Board with a broader, more complete picture of past practice than would be available if evidence were limited to Board area 21. At the same time such a geographic limitation will ensure that the length and cost of these proceedings are not increased by the admission of repetitive or irrelevant evidence of practice in areas that are geographically far removed from the work in dispute.

49. The parties have filed certain job lists with the Board. They have not however had an opportunity to review those job lists in light of this ruling by the Board with respect to the geographic scope of area past practice evidence. There are also some items raised in the pre-hearing memorandum about which parties were to advise the Board and each other such as, for example whether the trade unions will be relying upon their respective constitutions.

50. Under the circumstances the parties are directed to meet with each other in advance of the hearing dates which are to be scheduled to hear the merits of this complaint to ensure compliance with the undertakings and directions referred to in the pre-hearing conference memorandum. The parties are further directed to review the job lists which have been filed and determine which of the jobs referred to on those lists fall within the geographic parameters of our ruling herein. With respect to those jobs upon which the parties will rely which fall within the parameters of our ruling herein the parties must provide the name of the project, its location, the name of the owner

and/or general contractor, *a brief description of the work about which evidence is to be called*, the name of the contractor who performed the work, the identity of the trade or trades used to perform it and when it was performed.

51. At the continuation of the hearing of the merits of this complaint the parties must be prepared to state their position in respect of the information provided on the job lists, that is to say the parties must be prepared to indicate either their agreement or disagreement with the information. In the event any party disagrees with the information provided by another party, that party must be prepared to specify the extent of their disagreement with such information, and the evidence it has to refute such information or otherwise support its position. The Board anticipates that the length of the hearing required to adjudicate upon this complaint may be reduced if these matters are addressed at the commencement of the hearing.

52. The Registrar is directed to schedule further hearing dates in consultation with the parties.

0396-91-M Lise M. Field, Applicant v. United Electrical Radio and Machine Workers of Canada Local 540, Respondent

Trade Union - Applicant requesting Board to make declaration pursuant to section 84 of the Act - Union receiving notice of request but making no submissions to the Board - Board directing union to forthwith file copy of its constitution and by-laws with the Board

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Rundle* and *D. A. Patterson*.

DECISION OF THE BOARD; June 14, 1991

1. On April 29, 1991 the applicant requested the Board to make a declaration pursuant to section 84 of the Act. Section 84 reads as follows:

84. The Board may direct a trade union, council of trade unions or employers' organization to file with the Board within the time prescribed in the direction a copy of its constitution and by-laws and a statutory declaration of its president or secretary setting forth the names and addresses of its officers.

By letter dated May 15, 1991 the Registrar wrote to the respondent union, enclosing the applicant's request for a copy of its constitution, and noting that its comments, if any, should be received by the Board on or before May 31, 1991. As of the date hereof, there has been no response from the union.

2. Having regard to the foregoing, and pursuant to section 84 of the Act, the Board hereby directs that the respondent union *forthwith* file with the Board a copy of its constitution and by-laws.

2821-90-OH Ian Walker, Complainant v. Filtran Microcircuits Ltd., Respondent

Adjournment - Discharge - Health and Safety - Practice and Procedure - Witness - Complainant seeking adjournment so that health and safety inspector might testify - Request made less than 48 hours before hearing date - No positive indication given as to when or whether witness might be available - Adjournment request dismissed - Complainant alleging that he was discharged, contrary to *Occupational Health and Safety Act*, for engaging in work refusal and arranging for Ministry inspection - Board noting that alleged work refusal and Ministry inspection took place after complainant's discharge - Complainant not discharged because he invoked procedures of *Act* - Complaint dismissed

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *W. A. Correll* and *B. L. Armstrong*.

APPEARANCES: *Ian Walker* on his own behalf; *George Rontiris* and *Craig Sutton* for the respondent.

DECISION OF THE BOARD; June 24, 1991

1. This is a complaint alleging that the respondent (also referred to as the "employer") has violated section 24(1) of the *Occupational Health and Safety Act* (the "Act") in terminating the complainant's employment.

2. This matter first came on for hearing on March 13, 1991 before a different panel of the Board. At that time the complainant sought an adjournment in order to retain counsel and marshal his evidence. The employer consented to the request which was consequently granted and new hearing dates of May 1 and 2, 1991 were agreed to at that time. The complainant was also directed to provide particulars of his complaint. These and other details of the first hearing day in this matter can be found in the Board's decision dated March 18, 1991.

3. When the matter came back on for hearing before the present panel on May 1, 1991 the complainant was again seeking an adjournment. He explained that he wished to have the Ministry of Labour Occupational Health and Safety inspector involved in this matter testify in these proceedings and had, so far, been unable to make the necessary arrangements. He advised that the inspector in question had referred him to his supervisor and that the complainant had been unable to secure a reply from the supervisor regarding whether or not the inspector could be made available to testify. The complainant was unable to tell us when, or indeed whether, the inspector would be available to testify. The employer opposed the adjournment request.

4. The Board's approach to adjournment requests has been set out in *Labour Relations Bureau of Ontario General Contractors Association*, [1979] OLRB Rep. Nov. 1036, at paragraph 8:

... The usual practice of the Board is to grant adjournments only on consent of all of the parties to a proceeding. With respect to situations where one party is not prepared to agree to an adjournment, in the *Baycrest Centre of Geriatric Care* case, [1976] OLRB Rep. 432, the Board stated at page 433:

The Board policy with respect to adjournments has been capsulized in the *Nick Masney* case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal 70 CLLC 14,0240) wherein the Board stated:

'... the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjourn-

ments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party's case is unable to attend because of serious illness..." [see also *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879* (1979), 24 O.R. (2d) 400 at 404 et seq.]

5. In the present case, the first day of hearing was adjourned at the complainant's request to retain counsel. When the matter resumed the complainant advised that he would be representing himself although he had received advice from counsel. In the context of the latest adjournment request the Board drew the complainant's attention to sections 34(1)(a) and 34(2) of the Act which provide:

34.-(1) Except for the purposes of this Act and the regulations or as required by law,

- (a) an inspector, a person accompanying an inspector or a person who, at the request of an inspector, makes an examination, test or inquiry, shall not publish, disclose or communicate to any person any information, material, statement, report or result of any examination, test or inquiry acquired, furnished, obtained, made or received under the powers conferred under this Act or the regulations;

• • •

(2) An inspector or a person who, at the request of an inspector, accompanies an inspector, or a person who makes an examination, test, inquiry or takes samples at the request of an inspector, is not a compellable witness in a civil suit or any proceeding, except an inquest under the *Coroners Act*, respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the regulations.

7. We note as well that this request was made less than 48 hours before the resumption of the hearing and was not even mentioned as a possible difficulty at the first day of hearing. This notwithstanding the complainant's assertion that his efforts to secure the evidence in question commenced well before the first day of hearing. In any event, while there may be circumstances where the legitimate and unforeseeable unavailability of a witness leads to the granting of an adjournment request, this did not seem the appropriate course of action in the present case. Certainly in the absence of any positive indication of when (or whether) the evidence sought would be available and in view the statutory provisions already referred to, we saw absolutely no basis for granting the adjournment and once again delaying the final disposition of this matter. For these reasons we denied the complainant's request at the hearing and proceeded to hear the merits of the case.

8. Filtran Microcircuits Inc. is a manufacturer of high resolution microwave circuitry for the communications industry. The complainant was hired as production supervisor on September 5, 1989. At that time and during his relatively brief tenure he was responsible for supervising the schedules and work of approximately 9 employees. Given the nature of the enterprise, the respondent's workforce is fairly highly skilled and includes engineers, technologists and technicians. The complainant, however, has no formal technical training but was hired for his managerial skills. There is little question that in the seven months leading up to his termination the complainant encountered serious difficulties (whether of his own making or not) in the workplace. Whatever else may be said about the complainant's approach to his position, there is little doubt that he was a prolific author of memoranda. Over twenty of these, some quite lengthy and all written during the course of his employment, were filed as exhibits in these proceedings. These documents cover a wide variety of topics and include such titles as "methods of supervision" and "my strategies". A general review of these indicate both the degree of seriousness the complainant attached to his

position and the level of dissatisfaction he was experiencing in the job. Of all these documents only two could arguably be said to raise health and safety issues.

9. The first memorandum, dated October 18, 1989 involved the complainant's introduction of a "maintenance log sheet" in respect of one of the respondent's machines. We heard little further evidence in respect of this memo or whether this issue was the subject of any further discussion or controversy between the parties. The second document is an undated memorandum in which the complainant recommends the purchase of certain safety equipment such as respirators, a stretcher kit, an eye wash station, and a first aid kit. There was considerable dispute between the parties as to the origin of this document. The complainant testified that he prepared it entirely on his own initiative. Mr. Sutton, the employer's general manager, asserted that the complainant had been assigned the responsibility to prepare a list of safety items for purchase. However that conflict is resolved (and we do not find it necessary to do so for our purposes), we heard no evidence of the results of the memo i.e. whether the equipment was purchased or whether the issue continued to be the subject of discussions or controversy between the parties. These two memos are the only documentary evidence before the Board of any health and safety issues raised by the complainant or discussed between the parties during his tenure.

10. Mr. Sutton and Dr. K. Ramchandran, the complainant's immediate supervisor, prepared an employee performance and development appraisal on April 15, 1990 and presented it to and reviewed it with Mr. Walker at a meeting on Wednesday April 18, 1990. Although the appraisal form does contemplate the possibility of a recommendation for termination, no such recommendation was made. The appraisal was, on the whole, less than favourable with most items rated as "needs improvement". The complainant was obviously unhappy with the appraisal and prepared a four page written reply which he delivered the following day. It is not necessary for us to review the contents of this rejoinder except to note that no health and safety issues are raised or adverted to in it. Dr. Ramchandran and Mr. Sutton reviewed the complainant's reply and decided that a further meeting to discuss the matter was in order.

11. That meeting took place on Tuesday, April 24, 1990 and was attended by Mr. Sutton, Dr. Ramchandran and the complainant. According to Mr. Sutton the complainant was advised that he would be required to perform the tasks assigned to him. Mr. Walker replied that he would refuse to do so unless these tasks were to be done exactly the way he (the complainant) wanted them done. This reply is consistent with the evidence we heard from both parties regarding ongoing conflicts about management styles and was a reply Mr. Sutton related to the complainant's drive to introduce certain computer systems which the employer had already rejected as too expensive. Mr. Walker also indicated that if the employer put procedures into effect without his participation or approval he would not work with those systems. At that point Mr. Sutton and Dr. Ramchandran retired briefly to discuss the matter and returned to advise Mr. Walker that he would have to follow the employer's directions and that they could not retain an employee who refused to do so. Mr. Walker responded by saying that he would not quit and would have to be fired. At that point the complainant was given oral notice of his termination.

12. Mr. Walker's version of what transpired at the meeting does not substantially conflict with Mr. Sutton's version as just recounted. According to Mr. Walker, however, he did raise health and safety issues including matters related to his own personal health at the meeting. Furthermore, Mr. Walker's view was that he had merely been threatened with termination rather than having received actual notice of termination at the meeting. To the extent that the evidence conflicts, we prefer that of Mr. Sutton on these points. Given the complainant's demonstrated practice of committing his thoughts to writing in the form of memos as reflected in his four page reply to the appraisal, it seems unlikely to us that any significant issue in his mind would not have been

reflected in his written reply. We will return to the question of threatened rather than actual termination later in the decision.

13. After the meeting, which concluded at approximately 4 p.m., Mr. Sutton prepared the following memorandum:

April 24, 1990

To: Ian Walker

From: Craig Sutton

Subject: Notice of Termination

Please be advised that effective today your services with our company are being terminated.

As discussed, we are prepared to offer the remainder of this week and three additional weeks so that you may find alternate employment. Should you find employment earlier, then of course you may leave at your discretion. We wish you good luck in your job search and in your future career.

Yours truly,

Craig Sutton
Filtran Microcircuits Inc.

When completed, this memo was placed on Mr. Walker's desk. However, since the complainant had already left for the day he did not receive it until the following morning.

14. Mr. Walker had left work early that day and went to visit his physician, Dr. Rambert who completed a Workers' Compensation Board form titled Doctor's first Report. That report is extremely terse and indicates the "patient's history of injury" as "problem of stress at work - health and safety related" and describes the "injury" as "started working Sept 1989 - felt conditions unagreeable [sic] and could not cope on site". The diagnosis is indicated as "acute job related stress [illegible word]" and the form appears to suggest that the complainant will require 6-8 weeks off the job. We heard no evidence as to whether a WCB claim was allowed, rejected or even filed.

15. On that same day Mr. Walker also telephoned the Ministry of Labour and asked that a health and safety inspector be dispatched to inspect the workplace.

16. On the following day Mr. Walker was at the workplace only long enough to receive his written letter of termination and to provide the employer with a copy of the WCB form prepared by Dr. Rambert. Later in the day the workplace was inspected by an inspector from the Industrial Health and Safety Branch of the Occupational Health and Safety Division of the Ministry of Labour. Although 8 orders were issued to the employer subsequent to and flowing from the inspection, the evidence was uncontradicted that these were relatively minor matters and, in any event, further evidence was filed indicating that all of the orders were complied with within the time frames established by the inspector.

17. The complainant alleges his discharge was in contravention of section 24(1) of the Act which provides:

24.-(1) No employer or person acting on behalf of an employer shall,

(a) dismiss or threaten to dismiss a worker;

- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

18. In argument the complainant asserted that he had acted in compliance with the Act or sought its enforcement by refusing to work and by arranging for the Ministry inspection of the plant.

19. The work refusal essentially consists of the complainant having filed a copy of Dr. Rambert's report with the employer. Since the report apparently indicates the complainant should be off work for a period of time as a result of job related stress, Mr. Walker argues it is tantamount to a work refusal motivated by concerns related to occupational health and safety. Even assuming the doubtful proposition that these events can be characterized as a work refusal as contemplated by section 23(3) of the Act, we are not satisfied that this advances Mr. Walker's claim of a violation of section 24(1). The "refusal" in question clearly took place after the dismissal and it is therefore impossible to conclude that the dismissal occurred because of the "refusal". Mr. Walker testified that, in his view, neither the oral nor written notices of termination were actual notices of termination but rather were merely threats of termination. The evidence simply does not support such an equivocal characterization. However, even if we were to accept such a characterization in relation to the oral notice, the written document, cited earlier in the decision is extremely straightforward. The evidence was not entirely clear regarding the sequence of events related to Mr. Walker's receipt of the written notice of termination and his delivery of Dr. Rambert's report to the employer. These two events occurred either simultaneously or within minutes of each other. Even assuming that Mr. Walker did not actually receive the written notice of termination until a few minutes after his "refusal", we are nonetheless satisfied that his "refusal" took place after the employer had decided on his dismissal. Thus, we are unable to conclude that Mr. Walker was dismissed because of his "refusal".

20. We have less difficulty accepting Mr. Walker's claim that he was acting in compliance with the Act or seeking its enforcement in arranging for a safety inspection. Whatever other or further motives may have been at play, there is no doubt that Mr. Walker invoked procedures specifically contemplated and administered under the Act. However, Mr. Walker faces a similar difficulty in the second branch of his argument i.e. that he was dismissed because he invoked those procedures. Again, the evidence was not entirely clear. Mr. Walker testified that he called the Ministry on Tuesday April 24, the same day he received his oral notice of termination. Even assuming that he called the Ministry prior to receiving his notice, we are satisfied, on the balance of the evidence, that the employer was entirely unaware that Mr. Walker had contacted the Ministry at least until the inspector's arrival about an hour after Mr. Walker's final departure from the plant the following day. Thus we are equally unable to conclude that Mr. Walker was dismissed because he invoked the procedures of the Act.

21. Neither is this (nor was it seriously argued by the complainant to be) a case where we might be tempted to conclude that the complainant's history of agitating for compliance with the Act or otherwise advancing health and safety matters played any part in the employer's decision. In this context we observe once again that of all the many memos filed in evidence only two remotely touched on safety issues. There was no other evidence to allow us to conclude, even by

inference, that these two memos raised issues of particular or ongoing significance between the parties or that they, in any other way, figured in the employer's ultimate decision

22. The real reasons for Mr. Walker's discharge were articulated by him quite cogently in both his evidence and his argument. The complainant clearly felt besieged by what could best be described as a clash of management styles. Mr. Walker had some very particular views on ways to manage the enterprise including certain technological innovations. His views were not accepted and, according to him, often not even entertained by senior management. This undoubtedly resulted in a less than harmonious working environment for all concerned. Furthermore, in terms of the debate over management styles, we are prepared to assume (without finding) that all the equities fall with the complainant. We fail to see, however, how such a clash over management style in the context of the present case can support the argument that section 24(1) of the Act has been violated.

23. Accordingly, we find that the complainant's dismissal was not a violation of section 24(1) of the Act.

24. In argument the respondent addressed the applicability to the instant matter of section 24(7) of the Act which provides:

24.-(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

25. The complainant neither addressed, relied upon nor sought any relief in respect of section 24(7). Consequently, it is unnecessary for us to deal with this issue in any great detail. We would merely observe that on the basis of the tests outlined in *National Plastic Profiles Inc.*, [1990] OLRB Rep. Oct. 1078 and in *Bilt-Rite Upholstering Co. Ltd.*, [1990] OLRB Rep. July 755, we would have been unlikely to find the required nexus to health and safety which the Board identified as a prerequisite to any consideration of the exercise of discretion under section 24(7). Furthermore, it is also unlikely that any consideration of the Board's more recent review of section 24(7) in *H. H. Robertson Inc.*, [1991] OLRB Rep. Apr. 492, which deals with a complainant in an organized setting and otherwise protected by a collective agreement would have provided any further support in the present case for considering the exercise of our discretion under section 24(7).

26. The complaint is dismissed.

2272-90-FC Canadian Paperworkers Union, Applicant v. Great Lakes Community Credit Union Limited, Respondent

Evidence - First Contract Arbitration - Practice and Procedure - Parties continuing to negotiate after union's section 40a application - Whether Board ought to hear evidence of post-application bargaining sessions - Board concluding that negotiations which continue after a section 40a application has been filed ought not be the subject of evidence before the Board

BEFORE: *M. G. Mitchnick*, Chair, and Board Members *R. W. Pirrie* and *K. Davies*.

APPEARANCES: *Leanne Chahley*, *Cecil Makowski*, *Chris Monk* and *Teresa Rahmer* for the applicant; *D. J. Lenardon* and *G. L. Firman* for the respondent.

DECISION OF M. G. MITCHNICK, CHAIR, AND BOARD MEMBER K. DAVIES; June 21, 1991

1. This is an application under section 40a of the *Labour Relations Act* in which the Board over the course of six days of hearing received the evidence and submissions of the parties. A decision on the application was reserved by the Board at that point, and the Board has now been advised that the parties have resumed their negotiations, and have in fact been successful in arriving at a collective agreement. The application before us has accordingly been withdrawn.

2. At the outset of the hearing, however, the parties had made lengthy submissions to the Board on a matter of evidence, and the Board, in light of the history of that issue before the Board, reserved on the issue and undertook to deal with it in its final decision. Such final decision has now been rendered moot, as indicated, but the Board has been asked to provide its ruling on the evidentiary point nonetheless, in order that the community in dealing with section 40a applications in the future will have the benefit of that guidance. Given the practical difficulties surrounding uncertainty over this issue, now that the issue has been raised, the Board considers it appropriate to deal with the issue by way of the decision and reasons hereunder.

3. The present 40a application was a relatively unusual one in the Board's experience, in that like *Alma College*, [1987] OLRB Rep. Dec. 1453; [1988] OLRB Rep. July 641, it involved a breakdown over not simply one, or even two main issues, but rather an allegation that the respondent's whole pattern of bargaining, and in particular its failure to make any significant movement in its positions, was such as to bring into play sections 40a (2)(a), (b), (c) and, failing that, (d), and cause the Board to direct that these parties' first collective agreement be resolved by third-party arbitration. Section 40a in its material parts provides:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;

- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

The parties in these negotiations had agreed from the outset to divide their issues into “Language” and “Main Agenda” items, and to proceed first with the former. As a result, all of the testimony before the Board related solely to the efforts of the parties to make their way through the “Language” portion of the bargaining. In the circumstances now before us, it would not be pertinent to recite that testimony in any detail. Suffice it to say that, while a large number of Language items remained outstanding as of the date of this application, the attention of the parties in the bargaining leading up to the application had come to be focused in particular on the issues of:

- Seniority rights on lay-off and promotions
- the amendment of the bargaining unit Scope to exclude a “confidential secretary”
- restrictions on the use of “Temporary Employee”, and the rights of such employees
- specific penalty (discharge) for certain offences
- the scope of the Jury Duty provision
- the continuation of existing parking privileges and hours of work at the employer’s new downtown location.

4. The applicant Union had been certified on December 22, 1989, to represent an “all-employee” unit (then 9 persons) at the Great Lakes Community Credit Union Limited. Negotiations reached the stage of meetings with a conciliation officer by September of 1990. Those meetings, from the Union’s point of view, continued to generate no progress, and the Union requested a “no-Board” from the officer. It was then the decision of the Union that the present application should be filed, and the Union did that on November 28th. Prior to the filing of the application, however, the employer had requested the services of a mediator from the Ministry, and meetings in that regard were arranged with the parties for December 9th and 10th. The parties did in fact, in the face of the section 40a application, carry through with the mediation session as arranged, and by the end of those two days all of the language items in dispute were resolved. To the extent time permitted at the end of that second day, discussion then moved to the large number of items that had been left as “Main Agenda” items (being essentially the monetary items), but with no resolution. The parties subsequently made further efforts to resolve matters short of a hearing on the section 40a application, under the aegis of a Labour Relations Officer of the Board, but those deliberations once again ended in impasse.

5. The evidentiary matter left for the Board to decide in this case was the “cut-off” point for relevant evidence in a section 40a application. The Union made the initial point that all efforts with the Officer of the Board to settle the particular application short of litigation were “privileged” in any event, under ordinary principles, and the Board agreed. Beyond that, however, the Union argued that even negotiations which continue in the “normal” process of bargaining once the section 40a application has been filed are irrelevant, and ought not to be the subject of evi-

dence before the Board. Otherwise, submits the Union, the situation would never “crystallize” for the parties in a way that would allow them to assess when to invest the time and expense of preparing a section 40a application, and for each to know the case they have to meet if the matter does have to proceed to a hearing. To hold otherwise, the Union further submits, would invite “posturing” in any negotiations that take place subsequent to the application, with a view to evidence that the Board may be receiving should the matter in fact turn out to have to proceed to a hearing. Such evidence, the Union goes on to add, is not only without any real probative value, but can in fact be *misleading* to the Board: that is, as the very evidence before the Board in this case demonstrates, the Union submits, an employer would have the opportunity to “clean up its act” just enough to get the section 40a application dismissed as premature, and then revert to its old style of “stonewalling” as soon as the matter before the Board has been disposed of. While the Board *has* in fact entertained evidence of post-application bargaining sessions in the past, the Union notes, that was always on the concurrence of the parties, and the point was never argued or considered. See, for example, *Formula Plastics Inc.*, [1987] OLRB Rep. May 702; *Juvenile Detention (Niagara) Inc.*, [1987] OLRB Rep. Jan. 66. The argument on behalf of the respondent, simply put, is that the Board’s Practice Note is clearly aimed at producing settlements of the collective agreement, and that an employer is less likely to engage in any kind of bargaining after the application if there is “nothing in it” for it. The respondent also argues that it is clearly relevant to the Board to know what, if anything, has happened to the bargaining since the application was filed, in order to assess the *real* state of negotiations between the parties, and decide whether the bargaining process can in fact be said to have been “unsuccessful”.

6. The matter is indeed a difficult one - particularly since the real labour-relations goal of a section like 40a is to “encourage” the parties to reach that initial collective bargaining agreement on their own, and not have the Board impose third-party determination. To the extent that the Board has now been called upon to decide this question, however, the Board is persuaded that the approach articulated by the Union is the correct one. With any piece of litigation there normally is a fixed “cut-off” point, at least with respect to the initial question of liability, and if we were to adopt the position put forward by the respondent, it is difficult to see how there would *ever* be a fixed cut-off point as of which the parties are required and entitled to assess their chances and prepare for hearing (assuming that evidence of ongoing offers or “negotiations” were admissible at all, and not “privileged” as an attempt to settle the matter). Rather, we think that as a general rule the parties are required to make those assessments at the time that an application under section 40a is filed. At that stage, as the Board’s Practice Note indicates, the parties are required to file particulars of all of the material facts upon which they intend to rely, and those particulars are used by the Board to allow it to contain the case to one that the other party knows from the outset it is going to have to meet. If a respondent’s position is that the applicant has acted precipitously in filing its application, without the opportunity for dialogue really having been exhausted, that is something that the Board can assess in coming to a decision on the “merits” of the application, on the basis of what *has* transpired between the parties up to the point of the application. In the meantime the parties are, of course, completely free to continue their negotiations in an effort *to reach a collective agreement*, with a view to avoiding the need to litigate the section 40a application entirely, free from any thoughts about what will or will not appear before the Board by way of evidence, should the matter ultimately turn out in fact to have to proceed to a hearing.

DECISION OF BOARD MEMBER ROSS W. PIRRIE; June 21, 1991

1. As the majority have indicated, the matter being dealt with is a difficult one. Regrettably, I do not believe the majority have arrived at the correct decision.
2. Reaching a first collective agreement is a continuous process from the time of certifica-

tion to the signing of the contract. For the Board to segment that process and look only at the behaviour of the parties up to the application date will create a highly artificial situation. In my view the Board is quite capable of looking at the entire spectrum of the collective bargaining process and making a judgement as to the conduct of the parties. I do not feel the Board has been or will be easily duped by an employer who "cleans up its act" following a union's section 40a application.

3. That evidence pertaining to the fact of and the result of negotiations beyond the union's application dates has been admitted to date suggests to me that the need for a cut-off date is not of the significance that the majority cite at paragraph 6 of the decision.

4. As successive Board decisions have interpreted the language of section 40a to narrow what is acceptable employer conduct in first contract negotiations, the value to employers of participating in the direction portion of the process has become questionable. In my opinion this decision will simply be another reason for employers to back away from the process and save their time, energy and money for the interest arbitration portion of section 40a. If my judgement is correct, it will be regrettable for collective bargaining in the narrow sense of what has been a relatively successful means of encouraging the parties to settle first contracts, and in the wider sense for the entire area of collective bargaining.

3321-90-U Ivan Gudelj, Complainant v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC, Local Union 64, Respondent v. Canon Inc., Intervener

Collective Agreement - Unfair Labour Practice - Employee alleging that union violated sections 52 and 53 of the Act by beginning bargaining early and settling terms of new collective agreement before expiry of old one - Board holding that section 53 not prohibiting parties from bargaining early - Section 52 permitting amendments to collective agreement so long as there is no change in expiry date of agreement - Board finding nothing improper in parties negotiating replacement agreement in advance of expiry of existing one - Complaint dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *R. M. Sloan* and *C. McDonald*.

APPEARANCES: *Ivan Gudelj* appearing on his own behalf; *Joanne L. McMahon*, *Mohammedali Inshanalli*, *Carl Hamilton* and *Brian Scott* for the respondent; *Karen Weinstein* and *Alex Mestres* for the intervener.

DECISION OF THE BOARD; May 27, 1991

I

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent trade union has contravened sections 52, 53, and 85 of the Act. Those sections read as follows:

52.-(1) If a collective agreement does not provide for its term of operations or provides for its

operation for an unspecified term or for a term of less than one year, it shall be deemed to provide for its operation for a term of one year from the date that it commenced to operate.

(2) Notwithstanding subsection (1), the parties may, in a collective agreement or otherwise and before or after the collective agreement has ceased to operate, agree to continue the operation of the collective agreement or any of its provisions for a period of less than one year while they are bargaining for its renewal with or without modifications or for a new agreement, but such continued operation does not bar an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit and the continuation of the collective agreement may be terminated by either party upon thirty days notice to the other party.

(3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.

(4) Notwithstanding anything in this section, where an employer joins an employers' organization that is a party to a collective agreement with a trade union or council of trade unions and he agrees with the trade union or council of trade unions to be bound by the collective agreement between the trade union or council of trade unions and the employers' organization, the agreement ceases to be binding upon the employer and the trade union or council of trade unions at the same time as the agreement between the employers' organization and the trade union or council of trade unions ceases to be binding.

(5) Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation.

* * *

53.-(1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection (1).

(3) Where notice is given by or to an employers' organization that has a collective agreement with a trade union or council of trade unions, it shall be deemed to be a notice given by or to each member of the employers' organization who is bound by the agreement or who has ceased to be a member of the employers' organization but has not notified the trade union or council of trade unions in writing that he has ceased to be a member.

(4) Where notice is given by or to a council of trade unions, other than a certified council of trade unions, that has a collective agreement with an employer or employers' organization, it shall be deemed to be a notice given by or to each member or affiliate of the council of trade unions that is bound by the agreement or that has ceased to be a member or affiliate of the council of trade unions but has not notified the employer or employers' organization in writing that it has ceased to be a member or affiliate.

* * *

85.-(1) Every trade union shall upon the request of any member furnish him, without charge, with a copy of the audited financial statement of its affairs to the end of its last fiscal year certified by its treasurer or other officer responsible for the handling and administration of its funds to be a true copy, and, upon the complaint of any member that the trade union has failed to furnish such a statement to him, the Board may direct the trade union to file with the Registrar of the Board, within such time as the Board may determine, a copy of the audited financial statement of its affairs to the end of its last fiscal year verified by the affidavit of its treasurer or other officer responsible for the handling and administration of its funds and to furnish a copy of such

statement to such members of the trade union as the Board in its discretion may direct, and the trade union shall comply with such direction according to its terms.

(2) Where a member of a trade union complains that an audited financial statement is inadequate, the Board may inquire into the complaint and the Board may order the trade union to prepare another audited financial statement in a form and containing such particulars as the Board considers appropriate and the Board may further order that the audited financial statement, as rectified, be certified by a person licensed under the *Public Accountancy Act* or a firm whose partners are licensed under that Act.

A hearing in this matter was held, in Toronto, on March 27, 1991.

2. At the opening of the hearing, counsel for the union advised the Board that the union has no objection to providing a financial statement to the complainant or any other union member who wants one, however, the complainant did not request a financial statement before filing this complaint. The union gave the complainant its unaudited financial statement for the year ending October 30, 1990, and advised that this statement is currently being considered for approval by its head office. Once it is approved and returned, the union will provide a copy of this statement to any interested member including the complainant, as soon as it is available. The union is content that the Board make a direction to this effect. It is so ordered.

3. The facts concerning the complainant's section 52 and 53 allegations are not really in dispute.

4. The union and Canron are currently bound by a collective agreement which will expire on September 30, 1991. Article 29 of that Agreement and section 53 of the Act both contemplate that the parties can give notice to bargain for a renewal agreement anytime after June 30, 1991. The giving of notice is the first step in the bargaining process.

5. On January 25, 1991, the company wrote to the union to request an early commencement of negotiations. The union took that request to a membership meeting and the majority of those present voted in favour. By letter dated March 15, 1991 the union confirmed its willingness to begin bargaining early, and requested the company's suggestions for suitable meeting dates. A copy of the union's bargaining proposals was attached to the March 15, 1991 letter.

6. The parties met, bargained, and ultimately reached agreement on the terms of a new collective agreement which would come into effect when the old one expires on September 30, 1991. That settlement was put before a membership meeting, and a majority of the employees in attendance voted in favour of it.

7. The terms of the settlement include a new seven-day work schedule which has not, as yet, been put into effect. The terms also include a four thousand dollar "signing bonus" payable upon ratification of the new terms. Since the employees did, in fact, ratify the proposed agreement, the four thousand dollar payment was made to all eligible employees.

8. The complainant contends that it was a breach of sections 52 and 53 of the Act to begin bargaining early and to settle the terms of a new collective agreement before the expiry of the old one. The complainant wants the Board to:

- (1) direct that the settlement be set aside or declared void;
- (2) direct that new notice to bargain be sent after June 30, 1991 when, the complainant submits, it "should" have been sent;

- (3) direct that collective negotiations take place with a newly-constituted bargaining committee;
- (4) direct that any agreement reached be put to the membership for another ratification vote.

The complainant submits that since the above-mentioned settlement should not have been put to his fellow workers for ratification in the first place, he is content that the four thousand dollar "signing bonus" should be returned to the company.

II

9. Section 53 of the Act gives the parties to a collective agreement *the right* to give notice to bargaining for its renewal ninety days before the designated expiry date. Section 53 *does not prohibit* or *prevent* them from beginning to bargain earlier; nor does section 53 require the union to seek the members' approval before doing so. In any event, the union here received membership approval for an early start to bargaining. There is no breach of section 53 of the Act.

10. Section 52 of the Act requires a collective agreement to have a *specific term* and prevents the parties from terminating the agreement early without consent of the Labour Relations Board. Section 52 guarantees that employees will always be able to accurately determine when the collective agreement expires; and that is important because it is only during the last two months of the agreement that employees can apply to terminate the union's bargaining rights, or seek representation by another union. If the bargaining parties could end the agreement early they could unilaterally move the "open period" during which representation questions must be raised. Section 52 prevents them from doing so without Board consent.

11. On the other hand, section 52(5) makes it clear that the parties, by mutual consent, are entitled to change *any* of the provisions of the collective agreement *other than* its term of operation. The expiry date of the collective agreement must be certain, but the actual terms and conditions of employment contained in the agreement can be revised from time to time if the parties consider it advisable to do so. Indeed, it is not at all unusual for parties to renegotiate portions of a collective agreement to take into account problems that arise in its administration or changes in the market place. Such amendments are permitted, so long as there is no change in the expiry date of the agreement; that is, so long as there remains a clear and certain "open period".

12. Section 52 has no application to the facts of this case. The union and employer are not seeking an early termination of the 1989-1991 collective agreement. That agreement will still expire on September 30, 1991 in accordance with its terms. All the parties have done is to negotiate a replacement agreement in advance of the expiry of the existing one. There is nothing improper in that, nor is the Board's consent required.

13. The Board is satisfied that there has been no violation of either section 52 or section 53 of the Act. The complaint is therefore dismissed.

3308-90-R Hevac Fireplace-Furnace, Applicant v. United Steelworkers of America, Respondent v. Hevac Fireplace Furnace Manufacturing Ltd., Intervener

Conciliation - Termination - Timeliness - Termination application *prima facie* untimely as having been received by Board after the appointment of conciliation officer - Employer relying on s.113(3) of the *Act* to argue that application timely - Board ruling that s.113(3) not applying to Minister's decision to appoint conciliation officer - Employer also arguing that appointment of conciliator a nullity because application for conciliation not served on employer as required by Ministry form - Board ruling that alleged defect in service, even if true, would not affect validity of appointment - Board also noting that alleged irregularity waived by employer's failure to object when it first became aware of appointment - Termination application dismissed

BEFORE: *Nimal V. Dissanayake*, Vice-Chair, and Board Members *G. O. Shamanski* and *C. McDonald*.

APPEARANCES: *Robert Biggley* for the applicant; *Jonathan Eaton* and *Peggy McComb* for the respondent; *Mario Borg*, *David Borwick* and *Giuseppe Ferrara* for the intervener.

DECISION OF THE BOARD; June 11, 1991

1. The name of the respondent is amended to read: "United Steelworkers of America".
2. This is an application for termination of bargaining rights filed pursuant to section 57 of the *Labour Relations Act*. At the commencement of the hearing, counsel moved for dismissal of the application on the basis that it was untimely. The Board heard evidence and submissions on the issue of timeliness and this decision deals solely with that issue.
3. The evidence indicates the respondent union and intervener employer were parties to a collective agreement which expired on February 28, 1991. Notice to bargain for renewal of the collective agreement was given on December 20, 1990. The union filed a request for the appointment of a conciliation officer on March 1, 1991. By memorandum dated March 11, 1991, the Deputy Minister appointed Ms. D. Howe as conciliation officer to assist the parties.
4. The application for termination before us was mailed by regular mail on March 12, 1991 and was received by this Board on March 14, 1991.
5. The following provisions are relevant in determining the timeliness of an application for termination. Section 61(2) of the *Act* reads:

61.-(2) Where notice has been given under section 53 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

- (a) at least twelve months have elapsed from the date of the appointment of the conciliation officer or a mediator; or
- (b) a conciliation board or a mediator has been appointed and thirty days have

elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or

- (c) thirty days have elapsed after the Minister has informed the parties that he does not consider it desirable to appoint a conciliation board,

whichever is later.

Section 75(1) of the Rules of Procedure reads as follows:

75.-(1) Where a document is required to be filed by these Rules, filing shall be deemed to be made,

- (a) at the time it is received by the Board; or
- (b) where it is mailed by registered mail addressed to the Board at its office at 400 University Avenue, Toronto, Ontario, M7A 1V4, at the time it is mailed.

6. Since the application for termination was sent by regular mail, under section 75 of the Rules of Procedure it is deemed to be filed on the date it was received by the Board, that is March 14, 1991. Since the conciliation officer was appointed on March 11th, it is beyond doubt that the application would be untimely under section 61(2) of the *Act*.

7. The applicant's position simply is that he was not aware that there was any time deadline for the filing of this application. He did not obtain the forms until March 10th and it took him two days to get the application ready for mailing.

8. Counsel for the intervener recognized that *prima facie* the application was untimely. Nevertheless he took the position that the purported appointment of the conciliator was a nullity. He submits that section 61(2) contemplates a valid appointment of a conciliation officer before the deadline for a timely application and that in the absence of such a valid appointment, the "open period" continues. On that basis, counsel argued that the application was timely.

9. Counsel for the intervener made three arguments in support of his position that the application was timely. Firstly, he argued that service of the request for the appointment of a conciliator, was not served on the respondent as required by the terms of the affidavit of service which appears on the form made available by the Ministry. In his view this defect in service of the request on the employer rendered the appointment of the conciliation officer a nullity. The respondent took the position that service was effected as required by the form and that in any event the validity of the Minister's appointment of a conciliation officer was not affected by any defect in service.

10. Counsel for the union also relied on section 113(3) of the *Labour Relations Act*, and section 18 of the *Statutory Powers Procedure Act*. The union took the position that neither provision applied to a decision by the Minister to appoint a conciliation officer.

11. The Board finds that there is no merit whatsoever in counsel's arguments based on sections 113(3) of the *Labour Relations Act* and section 18 of the *Statutory Powers Procedure Act*. The only acts of the Minister covered by section 113(3) of the *Labour Relations Act* are (a) a notice from the Minister that he does not consider it advisable to appoint a conciliation board and (b) a notice from the Minister of a report of a conciliation board or of a mediator. It does not include a notice of appointment of a conciliation officer. Similarly, section 18 of the *Statutory Powers Procedure Act* does not govern the appointment of a conciliation officer by the Minister, because section 3 of that *Act* limits the application of section 18 to situation where the tribunal (in this case the

Minister) is required to hold a hearing before making the decision. The Minister is not so required to hold a hearing before appointing a conciliation officer.

12. The Board is also in agreement with counsel for the union that even if the service of the request on the employer did not meet the terms found on the form (we make no finding in this regard) that does not affect the validity of the appointment of a conciliation officer pursuant to that request. There is no requirement in the *Act* or the rules of service of a request on the employer. That is an administrative requirement set out by the Minister's office. In our view, such a requirement cannot affect an appointment of a conciliation officer, which is otherwise valid under the applicable legislation. The employer's submission is analogous to the argument made by the employer in an arbitration proceeding in *Re. Hanrahan's Tavern*, December 11, 1989 unreported, (Dissanayake) that the defective service of a request to appoint an arbitrator under section 45 of the *Labour Relations Act* rendered the appointment of the arbitrator pursuant to the request a nullity, and that therefore the arbitrator had no jurisdiction to hear the grievance. It was held that a requirement of service implemented by the office of arbitration in the course of administering section 45 does not affect the jurisdiction of an arbitrator whose appointment otherwise met the requirements of the *Act*. The form entitled "Request for appointment of conciliation officer", like the form used to request an arbitrator under section 45, is not a form that is statutorily prescribed. It is something developed for purposes of efficient administration. A failure to meet an administrative requirement contained in such a form in our view, does not affect the validity of the appointment of the conciliation officer.

13. While the Board has dealt with the legal arguments made by counsel for the intervener, even if we had found that one or more of those positions had any merit, in the particular circumstances here, the Board would not have allowed the employer to rely on those arguments. The uncontradicted evidence is that, once the conciliation officer was appointed pursuant to the allegedly defective request, the employer met with the conciliation officer on April 3, 1991 in an effort to effect a collective agreement and with her assistance was able to execute a memorandum of settlement on the only issue that remained unresolved. The employer did not object to the validity of the officer's appointment nor was a request made to the Minister that her appointment be revoked. It is uncontradicted that the appointment of the conciliation officer was questioned for the first time only after the present application was filed and its timeliness was challenged by the union.

14. In our view, it is not open to the employer in the context of a termination application, to make technical and legal arguments challenging the validity of the appointment of a conciliation officer, where it had waived any irregularity by failing to object when it first became aware of the appointment. Here the employer not only failed to object but actively participated and made use of the services of the conciliator. Having done so, it is simply too late for the employer to claim at the hearing of an application for termination that the appointment of the officer was *void ab initio*.

15. The instant application is clearly untimely, under the *Act*. While we have some sympathy for the applicants' plea of ignorance of the timeliness requirements, there are very sound policy reasons for the existence of those requirements and the Board must give effect to the clear legislative intent.

16. For all of the foregoing reasons, we find this application to be untimely and accordingly it is hereby dismissed.

0354-91-R United Steelworkers of America, Applicant v. Northland Power Partnership, Respondent v. Group of Employees, Objectors

Build-up - Certification - Employer arguing that current composition of bargaining unit not representative of employees who will be in it once facility fully operational - Whether application should be dismissed or a deferred representation vote held - Board not persuaded that expected lay-offs or expected hirings or combination of the two make it appropriate to dismiss or defer consideration of application, or to order representation vote - Interim certificate issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Ronson* and *C. McDonald*.

APPEARANCES: *P. Turtle* and *Marcel Desjardins* for the applicant; *Vincent P. Johnston*, *Fred Brown* and *Fred Hnatuk* for the respondent; *Michael J. Schapiro* for group of employees.

DECISION OF THE BOARD; June 12, 1991

1. This an application for certification.
2. The respondent, supported by the group of employees, objectors, argues that this application should be dismissed, or, in the alternative, that a deferred representation vote be held on the basis that the present employee composition of the bargaining unit is not representative of the employees who will be in it once the respondent's facility is fully operational.
3. The facility in question is an electrical power generating plant located in Kirkland Lake. Presently capable of producing approximately 80 megawatts, the plant is expected to be capable of producing from 98 to 108 megawatts of power (depending on the season). The construction of the facility is essentially complete. Cleanup work and the commissioning of the plant, during which time systems problems are worked out and the turbines are brought fully on line, remain to be completed. In particular, the respondent has been experiencing problems with the facilities' wood-boiler system.
4. At the time this application was made, the maximum number of persons and their classifications which might be included in the bargaining unit herein (depending upon how the bargaining description issue and the applicant's challenges are resolved) stood as follows:
 - i) four shift engineers;
 - ii) three assistant shift engineers;
 - iii) five engineers "trainees";
 - iv) four electricians;
 - v) two millwrights (maintenance);
 - vi) two shippers/receivers;
 - vii) twelve (non-construction) labourers.
5. The evidence disclosed that the labourers, who have been engaged in a wide variety of tasks, are now primarily engaged in cleanup work and what might be characterized as the more menial tasks that the engineer trainees would otherwise perform. This serves to free up the train-

ees for other work and enables them to study for examinations they must pass in order to qualify as engineers under the *Operating Engineers Act*. The respondent plans to begin laying off these labourers in mid-June, 1991 and expects that there will be no labourers left when the facility is fully operational sometime in July.

6. At present, the respondent anticipates it will use four crews of four persons working on a shift basis when the facility is fully operational. It appears that a fifth shift engineer will also be hired, presumably for relief purposes. Although that crew structure could change, the respondent anticipates that each crew will consist of a shift engineer, an assistant shift engineer, one of the current trainees and what was referred to as a "helper". The respondent will also retain two electrician positions and both millwright or maintenance positions. It appears also that one shipper/receiver position will be retained.

7. All twelve of the present engineering staff will be retained, as will two of the present electricians, both of the present millwrights, and one of the present shipper/receivers. The evidence with respect to the proposed "helpers" does not disclose whether or not they will have to be operating engineers or trainees, or whether or not those positions could be filled with some of the present labourers. In the result, on the evidence before the Board, it appears that a maximum of five persons may be hired by the respondent by sometime in July, 1991 and that fourteen of the present employees may be laid-off. However, it is also apparent that most of the employees who may be included in the bargaining unit in July, 1991 were already employed by the respondent at the time this application was made. More specifically, seventeen of the twenty-two employees the respondent expects to have at the facility in July, 1991 were employed by it at the time the application was made.

8. The Board has recognized that there are circumstances in which it is appropriate to defer consideration of an application for certification. Where, for example, the Board is satisfied that an application is premature because a significant build-up of the workforce will take place within a reasonable period of time, the Board may defer consideration of the application, and order that a vote be taken at a time when a substantial representative number of employees are at work. This "build-up principle", as it is come to be known, represents an attempt to reconcile the right of present employees to exercise their rights under the *Labour Relations Act* and the right of future employees to do so (see for example, *R. ex rel. United Steelworkers of America et al v. Labour Relations Board (Saskatchewan)* and the *Random Mines Ltd.* [1970] (7d) L.R. 3rd 1, 69 CLLC para. 14,205 (SCC); *Champlain Forest Products Limited* [1972] OLRB Rep. May 399; *Inco* [1973] OLRB Rep. March 172). This principle has been applied in limited circumstances (see, for example, *Emile Frant and Peter Waselovich* 57 CLLC para. 18,057; *F. Lepper & Son Ltd.* [1977] OLRB Rep. Dec. 846). More specifically, if the employees at work do not constitute a substantial and representative part of the workforce which is expected to be employed within a reasonable period, and the build-up does not depend upon factors beyond the employer's control, the Board may defer consideration of an application for certification or order a deferred vote.

9. The respondent concedes that the instant case is not a classic build-up situation. However, supported by the group of employees, objectors, it urges the Board to take a flexible approach to the build-up principle and apply it in circumstances where a number of employees will be let go and a number of others will be hired.

10. It is trite to say that the Board's policies are not written in stone. They are used as general guidelines and the Board must be responsive to the real world of labour relations and the circumstances of particular cases in developing or applying its practices or policies. On the other hand, practices or policies which have evolved over and withstood the test of time should not be

abandoned, restricted, or expanded unless there is a cogent reason to do so. To take a different approach would destroy the value of practices or policies as guidelines, create undesirable uncertainty and undoubtedly result in protracted unnecessary litigation.

11. In *Simpsons Limited*, [1985] Board Rep. May 731, the Board dealt with a “build-down” argument as follows:

7. Moreover, the respondent’s argument, in essence, is based upon the premise that persons who will not be actively employed once the union is certified and a contract negotiated, who will not be subject to any collective agreement provisions including the obligation to pay union dues (to quote in part from the respondent’s written submissions at pg. 4), should not be counted in the usual fashion in the certification application. To reiterate, the respondent asserts that if the deletion of the cards of those who were given layoff notices (and, of course, the others given notice who did not sign cards) results in the slippage of union support to 55% or below, a vote should be ordered. The Board does not agree that receipt of the layoff notices somehow divorces the interests of those employees from the other employees in the bargaining unit. Those scheduled for layoff may have a very real interest in the outcome of the certification application and a subsequent collective agreement. To give but one example, the collective agreement could well provide for recall rights of considerable value to those laid off. Employees at the application date who have received layoff notices may yet retain a real interest in the certification application and bargaining process, if the applicant is certified. Thus, the Board does not agree that such employees’ wishes should be discounted, at least, in the present circumstances where the decrease in the work force is less than 20%.
8. The Board would add that, in rejecting the respondent’s build-down argument, it is not mechanically applying a build-up rule. Rather, the approach of the Board in build-up cases, as stated earlier, is one of balancing competing interests. In this case, the decrease in the work force resulting from the layoff notices is not such as to make the employee complement at the application date unrepresentative and, in that representative group, the applicant enjoys membership support in excess of fifty-five per cent. Thus, in these circumstances, the Board declines to exercise its discretion, pursuant to section 7(2) of the Act, to order a representation vote where the applicant’s level of membership support is greater than fifty-five per cent.

We agree. We are not persuaded that the likelihood that the twelve labourers and two other employees presently employed by the respondent will be laid-off in the near future should prohibit them from exercising their rights under the Act. Similarly, the fact that five (or even seven as asserted in the respondent’s reply but not substantiated in the evidence before the Board) employees are likely to be added to the core group of seventeen is not the kind of accretion to the work-force which makes it appropriate to apply the build-up principle or one analogous to it.

12. In the result, we are not persuaded that the expected lay-offs, or the expected hirings, or a combination of the two make it appropriate to dismiss or defer consideration of this application, or to order a representation vote in it.

13. The parties have come to a partial agreement with respect to the description of the bargaining unit herein as follows:

all employees of the respondent in the Town of Kirkland Lake, save and except *supervisors, persons above the rank of supervisor, office and clerical employees, and students employed during the school vacation period.*

[Emphasis added to the part of the description
in dispute between the parties.]

The difference between the parties in that respect seems to centre on whether persons classified as “shift engineers” should be included in the bargaining unit. The applicant asserts that shift engineers should be included and appears to assert that the exclusionary line should be drawn above that position. The respondent appears to take the contrary view.

14. The applicant filed twenty-two pieces of documentary membership evidence in support of this application. Each one complies with the requirements of section 1(1)(l) of the Act. In addition, the applicant filed the requisite Form 9, Declaration Concerning Membership Documents, which attests to the regularity and sufficiency of the membership evidence.

15. The group of employees, objectors, filed five statements of desire (or “petitions”) in opposition to this application. These contained twelve different signatures, but only two are of employees who may be in the bargaining unit who had previously signed one of the pieces of membership evidence submitted by the applicant.

16. Finally, the applicant filed a “counter petition” containing one signature.

17. On the basis of the documentary evidence before the Board, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 13, 1991, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act, regardless of the manner in which the bargaining unit is finally described, and regardless of which of its challenges, if any, the applicant is successful in. (In that respect also, we note that the applicant filed membership evidence with respect to well in excess of fifty-five per cent of the seventeen employees who will be retained by the respondent when its facility is fully operational.)

18. Further, the overlap between the petitions filed in opposition to the application and the applicant’s membership evidence (which overlaps are the significant aspect for purposes of the Board’s considerations; see for example, *Unlimited Textures Company Limited* [1984] OLRB Rep. Jan. 138) is such that even if it proved to be voluntary, the petitions would not raise sufficient doubt with respect to the continued employee support for the application to cause the Board to exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken notwithstanding the level of employee support for the application as indicated by the applicant’s membership evidence.

19. In the circumstances, and because the matters remaining an issue between the parties cannot affect the applicant’s right to certification, the Board finds it appropriate, in the exercise of its discretion under section 6(2) of the *Labour Relations Act*, to certify the applicant on an interim basis pending the final resolution of the matters in issue with respect to the composition of the bargaining unit.

20. Consequently, pursuant to section 6(2) of the Act, the Board hereby certifies the applicant for employees of the respondent in the Town of Kirkland Lake, save and except supervisors, persons above the rank of supervisor, office and clerical employees, and students employed during the school vacation period.

21. A formal certificate must await a final determination of the composition of the bargaining unit.

22. In that respect, the Board authorizes a Labour Relations Officer, to be designated by

the Board's Manager of Field Services, to inquire into and report to the Board with respect to the list and composition of the bargaining unit, and more specifically, with respect to the bargaining unit description issue and the applicant's challenges to the list of employees.

23. Finally, with respect to interim certification, the attention of the parties is directed to the Board's decision in *Comstock Funeral Home Ltd.* [1982] OLRB Oct. 1436 and *P & M Electric Limited* [1989] OLRB Oct. 1064).

2140-90-U United Food and Commercial Workers International Union, AFL, CIO, CLC, Complainant v. Peter Gorman & Sons (Wholesale) Ltd., Respondent

Discharge - Discharge for Union Activity - Unfair Labour Practice - Employer refusing to allow in plant organizer to return to premises on grounds that he had quit without giving notice - Board concluding that in plant organizer had not quit - Board not satisfied that employer motivation free of anti-union considerations - Reinstatement with compensation and posting ordered

BEFORE: Ken Petryshen, Vice-Chair, and Board Members R. W. Pirrie and K. Davies.

APPEARANCES: Roman Stoykewych, Kevin Corporan, Kevin Benn and Deborah Smith for the applicant; Walter Thornton and Peter Gorman for the respondent.

DECISION OF KEN PETRYSHEN, VICE-CHAIR, AND BOARD MEMBER K. DAVIES; June 11, 1991

1. The name of the respondent is amended to read: "Peter Gorman & Sons (Wholesale) Ltd.".
2. This is a section 89 complaint made by the United Food and Commercial Workers International Union, AFL, CIO, CLC on November 14, 1990 wherein it is alleged that Peter Gorman & Sons (Wholesale) Ltd. contravened sections 3, 64, 66 and 70 of the *Labour Relations Act* in its treatment of Joe Anthony on or about November 6, 1990. The respondent's response to this allegation is that Anthony either quit his employment on November 6 or acted in such a manner as to cause the respondent to conclude that he quit. The respondent also takes the position that, in any event, it did not contravene the Act in its treatment of Anthony.
3. The respondent called Peter Gorman, the owner, D. Cowell, the shipping manager, and E. Langley to give evidence. The complainant called Anthony and J. Forester, a UFCW organizer, to testify. There is a considerable degree of conflict in the evidence given by these witnesses. In determining the facts, the Board has carefully reviewed all of the evidence and the parties' submissions relating thereto.
4. The respondent is a food and confectionery wholesaler located in Peterborough. The warehouse and trucking components of the business employ approximately 13 employees, while there are approximately 12 employees working in the office and sales areas. Anthony was employed by the respondent as a truck driver since June 1990. He was the most active employee involved in the complainant's efforts to obtain bargaining rights for the warehousemen and truck drivers employed by the respondent. It was Anthony's idea to contact a union and he did contact

the complainant. He arranged meetings with union officials, he invited employees to organizing meetings and spoke at these meetings, and he obtained three membership cards. Peter Gorman received notice from the Board of the complainant's application for certification on October 26, 1990 and he testified that he had no knowledge of the complainant's organizing campaign prior to October 26. Peter Gorman also testified that he had no knowledge of Anthony's union activities until he received notice of this complaint from the Board.

5. The evidence which the parties called concentrated primarily on events which occurred on October 29 and November 6, 1990. Anthony worked on October 29 until the lunch hour when he advised Mr. White that he was not feeling well and was going home. At approximately 1:30 p.m., Anthony received a telephone call from Peter Gorman. Peter Gorman had heard that Anthony went home earlier in the day and the purpose of his phone call was to determine why he had left work. During the phone call, Peter Gorman mentioned two customer complaints and indicated that he would discuss them with Anthony when he returned to work. Since he was curious about the complaints, Anthony returned that afternoon to the respondent's premises where a meeting was held between Peter Gorman, Anthony and D. Cowell. After discussing the customer complaints, there was some discussion between Anthony and Peter Gorman concerning the union. There is considerable conflict in the evidence given by Peter Gorman and Cowell on the one hand and Anthony on the other regarding what Peter Gorman said during the discussion about the union. We find it unnecessary in the circumstances to set out in detail each witness' version of what Peter Gorman said and to decide what version is true. Suffice it to say that Peter Gorman and Anthony both stated that at one point during the meeting Anthony told Gorman that he would not quit his employment and that Gorman would have to fire him.

6. In his evidence, Anthony stated that he and Cowell had a telephone discussion shortly after October 29 and before November 6 in which Cowell told Anthony not to be late since Peter Gorman knew he was the "ringleader". When this conversation was put to Cowell in cross-examination, he responded by saying that he did not remember such a conversation. The Board accepts Anthony's evidence concerning what was said by Cowell during this conversation. In our view, it is unlikely that Cowell would fail to recall such a conversation.

7. On November 6, Anthony started work at 6:00 a.m. but left the premises at approximately 8:00 a.m. He testified that he was quite ill, took a quick look for Cowell but could not find him, left his keys, run sheet and gas credit card on Cowell's desk and before leaving advised E. Langley that he was going home since he was not well and that Peter Gorman could call him at home. In his evidence, Langley, who was employed at the time as a part-time driver, denied that Anthony said anything to him when he was leaving. From 6:00 a.m. to approximately 8:00 a.m., Anthony was loading his truck and completing his run sheet. The respondent provides each driver with a gas credit card for purchases of gas and oil that may be required for his truck. Anthony stated that the reason he left the truck keys and the run sheet on Cowell's desk was because he thought they would be needed by the driver who took his run. Since Anthony thought Langley would likely do his run, he also left the gas card since he believed Langley did not have one. After leaving the premises, Anthony did not speak to anyone employed by the respondent until late in the afternoon of November 6.

8. At approximately 8:00 a.m. on November 6, Cowell noticed that Anthony was not present. He noticed that Anthony's car was gone, the gas credit card was on his desk and no one appeared to know where Anthony was. Cowell took the gas credit card to the office manager and explained what had happened. At about 8:45 a.m., the office manager asked Peter Gorman if he knew that Anthony had quit. In order to ascertain what was going on, he went and spoke to Cowell. Cowell advised Peter Gorman of what had happened that morning and, in particular, what

items Anthony had left on his desk. Peter Gorman testified that on the basis of what he was told he concluded that Anthony quit. Peter Gorman also stated that he then advised Cowell that if someone leaves without notice, Cowell was not to allow that person to come back. Peter Gorman stated that Cowell said he knew that. In his evidence, Cowell indicated that this was the first time he had heard of such a policy. After his discussion with Peter Gorman, Cowell proceeded to cover Anthony's run.

9. At approximately 5:00 p.m. on November 6, 1990, Anthony called Cowell at home after being unable to reach either him or Peter Gorman at the respondent's premises near the end of the workday. Again, Anthony's and Cowell's version of what was said during this conversation varies considerably. According to Cowell, he simply told Anthony what Peter Gorman had told him earlier that day. He told Anthony that since he left without saying anything, he was not allowed back on the premises. Cowell testified that he did not ask Anthony why he left work and that Anthony did not offer any explanation for leaving. Cowell also stated that he did not inform Peter Gorman of his conversation with Anthony. Anthony testified that he told Cowell that he left work earlier in the day since he was not feeling well but that he would be in the following morning. According to Anthony, Cowell then responded by saying that Peter Gorman had made a few changes and that he was not allowed on the premises. In employing the usual tests for deciding credibility issues, the Board prefers Anthony's evidence to that of Cowell's. In the circumstances, it is difficult to accept that Cowell would not have asked Anthony why he left work earlier in the day if Anthony did not give an explanation for leaving, particularly since the two were friends. It is also difficult to accept that Cowell would not have relayed the substance of this call to Peter Gorman. The Board is satisfied that during this telephone conversation, Anthony told Cowell that he left work earlier in the day because he was ill, that he intended to return to work the following day and that Cowell told Anthony that he was not allowed on the premises.

10. After his telephone conversation with Cowell, Anthony immediately called Forester, the organizer for the complainant. After a brief conversation, Forester left his home for Peterborough in order to meet with Anthony. In reviewing Forester's evidence, the Board is satisfied that Anthony described the relevant events to Forester in the same way he described them in his evidence before the Board. In essence, Anthony told Forester that he left the respondent's premises on November 6 because he was ill, that he advised Cowell of this during the telephone conversation in the late afternoon of November 6 and that Cowell advised him he was no longer allowed on the respondent's premises. In the initial particulars filed with the complaint, it was alleged that Anthony attended at the respondent's premises on November 7. Before Anthony testified, the complainant amended its particulars and Anthony testified that he did not go to the respondent's premises on November 7 but merely attempted to talk to Peter Gorman on the telephone without success. When Forester left Anthony on November 6, he understood that Anthony would go to see Peter Gorman the next day. On the following day, when he received a message from Anthony to the effect that he was not allowed to work that day, Forester assumed that Anthony did attend at the respondent's premises and this was reflected in the complaint that was filed. The Board permitted counsel to the respondent to pursue with Anthony the discrepancies between the complaint as initially filed and Anthony's evidence. In reviewing all the relevant evidence on this point, the Board is satisfied with Forester's explanation of what had occurred and also that the evidence does not lead to a conclusion which damages Anthony's credibility.

11. In mid-December 1991, Anthony called Cowell and asked him if he would set out in a letter their telephone conversation of November 6. Cowell agreed to do this. Cowell provided a letter to Anthony and also gave one to Peter Gorman. Anthony asked for this letter since he felt it would assist his complaint. When he reviewed the letter prepared by Cowell, it did not conform with Anthony's recollection of the November 6 conversation. Cowell testified that at about the

same time Anthony told him that he had made a mistake by quitting and that he did not advise Peter Gorman of this discussion. Anthony denied telling Cowell that he had made a mistake by quitting. In reviewing the evidence of Cowell and Anthony on this point, the Board prefers the evidence given by Anthony. It appears highly unlikely that Anthony would ask Cowell for a letter which he believes would support his complaint against the respondent and at the same time admit he quit his job. All of the evidence before us demonstrates it is quite improbable that Anthony would at any time have taken the position that he quit his job with the respondent.

12. It was suggested by counsel for the complainant in his questions of a number of witnesses and in argument that the normal practice for the respondent would have been to attempt to call Anthony on November 6 in order to determine why he left work. Since the respondent did not attempt to contact Anthony, the complainant suggests that the respondent's failure to follow a standard practice illustrates an anti-union motivation on the part of the respondent in its treatment of Anthony. If an employee does not appear at work when scheduled, the respondent does attempt to contact the individual in order to determine what the problem is. The respondent's response when someone leaves work during the course of a scheduled shift is not so clear, probably because such an event seldom occurs. After reviewing the evidence however, the Board is satisfied that in the situation confronting it on November 6 with Anthony, the respondent would more likely than not in the normal course have attempted to contact Anthony. On October 29, Peter Gorman called Anthony in order to ascertain why he was not at work. On this same day, Anthony advised Peter Gorman that he would not quit and would have to be fired. Given our understanding of when and why the respondent would attempt to telephone employees, the Board does find it surprising that no attempt was made by the respondent to attempt to contact Anthony after he left the premises on November 6, given the respondent's usual practice.

13. Section 89(5) is applicable to the allegations made by the complainant. In the *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board addressed the effect of the section 89(5) reversal of the onus of proof as follows:

17. ... Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

14. In contested section 89 complaints, employers do not openly admit to acting in contravention of the Act. In assessing the reasons for an employer's conduct, the Board's task, in essence, is to examine all the circumstances of a particular case in order to determine whether the employer's reason(s) are based on anti-union considerations.

15. Did Anthony quit his employment on November 6 or did Peter Gorman honestly conclude that Anthony quit his job? When one reviews all of the relevant evidence, and in particular Anthony's evidence, it is difficult to conclude that Anthony quit. The leaving of the keys, run sheet and in particular, the gas credit card, is some objective evidence of quitting. However, the leaving of these items is also consistent with Anthony's explanation that he left them for E. Langley, the part-time driver whom he assumed would take his run. Although we have some difficulty with some aspects of Anthony's evidence, we believe him when he says that he had no intention of quitting his job. The objective evidence is consistent with Anthony's explanation that he had every intention of returning to work on the following day. It is also difficult to conclude from the evidence that Peter Gorman honestly believed that Anthony quit. Although Anthony had not been employed for any considerable length of time, the evidence does not disclose that he was generally anything other than a satisfactory employee. On October 29, a very short time before November 6,

Anthony specifically advised Peter Gorman, in Cowell's presence, that he had no intention of quitting. In the context of these facts and the unusual circumstances of November 6, we have some difficulty in determining that Peter Gorman concluded as quickly as he suggested in his evidence that Anthony had quit.

16. Peter Gorman determined that Anthony would not be allowed to return to the respondent's premises. There is an onus on Gorman to satisfy the Board that this decision was not motivated by anti-union considerations. As we noted above, the Board is not satisfied that Peter Gorman made this decision concerning Anthony simply because he concluded that he quit without giving any notice. The events concerning Anthony take place soon after Peter Gorman learns of the complainant's application for certification. The bargaining unit of warehousemen and drivers is relatively small and Anthony was quite active in the complainant's organizing campaign. A short while before November 6, Cowell, a member of management, warns Anthony not to be late since Peter Gorman knows he is the "ringleader". Given the respondent's practice, the circumstances of November 6 are such that one would have expected the respondent to attempt to contact Anthony in order to determine why he was not at work. Since no attempt was made to contact Anthony, one is left to speculate as to the reason why the respondent did not act in a way one would normally have expected it to act. The complainant alleges that it did not act as it might normally have done since it saw the opportunity to rid itself of an active union supporter. In reviewing this evidence concerning the respondent's treatment of Anthony, the Board is not satisfied that the respondent has met its onus of establishing that its motivation was free of anti-union considerations.

17. Accordingly, the Board finds that the respondent has contravened sections 64, 66 and 70 of the *Labour Relations Act* and hereby orders the respondent to reinstate Joe Anthony to employment with full compensation for his losses including interest as calculated in the usual manner. We also direct the respondent to post for 60 consecutive days in conspicuous places in the workplace the Notice to Employees attached as Appendix "A" hereto.

18. The panel will remain seized in the event that the parties are unable to resolve the issue of compensation.

DECISION OF BOARD MEMBER ROSS W. PIRRIE; June 11, 1991

1. I dissent from the decision of the majority.

2. If the events of this case were as described by Mr. Anthony, it is my view that this matter would not have been before the Board. Surely his friend, Mr. Cowell, following their phone conversation on the evening of November 6, 1990 would have advised Mr. Gorman that Anthony had in fact been ill. Surely his fellow worker and member of the bargaining unit would have advised Gorman that Anthony had in fact been ill. Faced with such information Gorman could not have hoped to sustain a concocted story that Anthony had quit. I found Messrs. Gorman, Cowell and Langley to be quite credible in relating their evidence.

3. I am also troubled by the convenience of the amended section 89 complaint filed by the union on behalf of Mr. Anthony.

4. I found no anti-union motive attached to Mr. Gorman and based on the evidence I accept that Mr. Anthony in fact resigned his employment. I would not have ordered Anthony reinstated and I would certainly not have ordered a posting.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT LAYOFF, DISCHARGE OR THREATEN TO LAY OFF OR DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

PETER GORIAN & SONS (WHOLESALE) LTD.

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE WORKING DAYS.

0630-91-FC Labourers' International Union of North America, Local 1059, Applicant v. Strathroy Concrete Forming (1988) Inc., Respondent

Adjournment - First Contract Arbitration - Practice and Procedure - Employer filing nothing in response to Union's application - Employer phoning Board Registrar on morning of hearing date and asking for hearing to be rescheduled - Board denying adjournment and proceeding with application - Board satisfied that employer failed to make reasonable or expeditious efforts to conclude collective agreement - First contract arbitration directed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Ronson* and *P. V. Grasso*.

APPEARANCES: *L. A. Richmond*, *M. Lewis* and *J. MacKinnon* for the applicant; no one appearing on behalf of the respondent.

DECISION OF THE BOARD; June 13, 1991

1. This is an application, under section 40a of the *Labour Relations Act*, for a direction that a first collective agreement between the parties be settled by arbitration. The application was filed with the Board on May 28, 1991 and was scheduled to be heard on June 13, 14 and 20, 1991.

2. The respondent filed nothing in response to the application, either in accordance with Board Practice Note No. 18 or otherwise. The only communication from the respondent with respect to this matter were two telephone calls. Apparently, on June 11, 1991, Ed Baker, a principal of the respondent, telephoned the Registrar's office. The message he left does not indicate the purpose of his call and when the Registrar's office returned it, Mr. Baker was not available. Mr. Baker did not return the Registrar's office's call until June 12, 1991 at approximately 10:00 a.m. (30 minutes after the time the hearing was scheduled to begin). At that time, Mr. Baker asked the Registrar to "reschedule" the hearing to some later date. The Registrar advised the panel of this request just as it was about to begin the hearing. The panel saw no reason to not proceed in accordance with the Board's usual practice in such circumstances and, having waited more than the usual 30 minutes beyond the scheduled starting time, commenced the hearing. We understand that the Registrar so advised Mr. Baker.

3. The Board began the hearing by advising the applicant of the telephone calls from the respondent to the Registrar's office as aforesaid. The applicant advised the Board that it had received no communication from the respondent with respect to any adjournment request and submitted that the Board should proceed with the application.

4. Sections 40a (1) and (2) of the *Labour Relations Act* provide that:

40a.-(1) Before or after the commencement of a strike or lock-out, the employer of the employees in the affected bargaining unit may request that a vote of such employees be taken as to the acceptance or rejection of the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties and the Minister shall, and in the construction industry the Minister may, on such terms as he considers necessary direct that a vote of such employees to accept or reject the offer be held and thereafter no further such request shall be made.

(2) A request for the taking of vote, or the holding of a vote, under subsection (1) does not abridge or extend any time limits or periods provided for in this Act.

It is evident that the Legislation contemplates that applications for a direction that a first collective agreement be settled by arbitration will be dealt with by the Board expeditiously. Indeed section

40a(2) specifically directs the Board to consider and make its decision on such an application within 30 days of receiving it. Although the time limits in section 40a are directory rather than mandatory (see *Del Equipment Limited*, [1989] OLRB Rep. Jan. 19; *Nepean Roof Truss Limited*, [1986] OLRB Rep. Sept. 1287), there is no doubt that the maximum "labour relations delayed are labour relations defeated and denied" (see, *Journal Publishing Co. of Ottawa Ltd. et al. v. Ottawa Newspaper Guild, Local 205, OLRB et al.*, March 31, 1977, Ontario Court of Appeal, unreported) is particularly applicable to first collective agreements situations. In recognition of that reality, the Board in section 40a proceedings will normally not grant an adjournment except on consent of the parties or where there are exceptional extenuating circumstances (for examples of circumstances in which the Board has denied requests or adjournments in section 40a proceedings see *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441 and *Atway Transport Inc.*, [1991] OLRB Rep. Apr. 425). Further, it is the Board, not the parties or any of them, which is the master of proceedings before the Board, and a party which has had adequate notice of the hearing does not have a right to have it adjourned for the convenience of itself or its representative (*Re Flamboro Downs Holdings Ltd. and Teamsters Local 879* (1979), 24 O.R. (2d) 400 (Ont. Div. Court)).

5. The material before the Board indicates that the applicant served the respondent with its application in accordance with Board Practice Note No. 18 on May 27, 1991. Having made no effort to contact the Board or the applicant with respect to any extension of time with respect to the filing of materials, or an adjournment of the scheduled hearing, the respondent was not entitled to assume that a telephone call to the Board on the eve or the very morning of the hearing would result in an adjournment. It is appropriate that a party seeking an adjournment in section 40a proceedings advise the other party (or parties) and the Board of its request as soon as possible, and that it seek the consent of the other party (or parties) in that respect. If time is short, or the party seeking the adjournment is otherwise unable to contact the other party (or parties) or it (or they) do not consent, it will generally be necessary for the party seeking the adjournment, or someone on its behalf, to appear before the Board to formally make a request in that respect.

6. In this case, the respondent waited until the last moment to request an adjournment, and never did contact the applicant in that respect. In addition, the Board was not satisfied that there was any cogent reason to grant the respondent's telephone request. The Board therefore denied the respondent's request for an adjournment and proceeded with the application.

7. The evidence before the Board substantiated the assertions pleaded by the applicant in its filing in this matter. The Board was satisfied that the respondent had failed to make reasonable or expeditious efforts to conclude a collective agreement with the applicant and that, as a result, the process of collective bargaining between the parties had been unsuccessful (section 40a(2)(c)). The Board therefore directed (orally) that a first collective agreement between the parties be settled by arbitration pursuant to section 40a of the *Labour Relations Act*.

2236-90-R; 2237-90-R Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, Applicant v. **Summit Food Distributors Inc.**, Respondent v. Group of Employees, Objectors; Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, Applicant v. Summit Food Distributors Inc., Respondent

Adjournment - Certification - Petition - Practice and Procedure - Witness - Petitioner testifying in-chief on first day of hearing - Petitioner not returning to be cross-examined on continuation date for "medical reasons" - Counsel unable to say when petitioner would be available - No medical report filed or diagnosis offered - Objectors' counsel seeking indefinite adjournment - Adjournment request denied - Board rejecting petition as unsupported by credible affirmative evidence as to its origination and circulation - Certificate issuing

BEFORE: *R. O. MacDowell*, Alternate-Chair, and Board Members *W. H. Wightman* and *K. Davies*.

APPEARANCES: *Linda Huebscher, Andrew C. Bome, Wayne Gibson, Anthony Kircher and Jim O'Donnell* for the applicant; *Anneli LeGault, Jack Battersby and Bob Fowler* for the respondent; *Daniel J. McNamara and Frank Spada* for the objectors.

DECISION OF THE BOARD; June 24, 1991

I

1. These are two applications for certification concerning the employees working in the respondent's wholesale food business at 580 Industrial Road in London, Ontario. The parties are agreed that the correct name of the respondent is Summit Food Distributors Inc. "Joe Dees Wholesale" is merely the name applied to an aspect of the respondent's business. Joe Dees Wholesale is neither a separate corporate entity nor separate employer. Accordingly, the application for certification made in respect of Joe Dees Wholesale (Board File 2237-90-R) is hereby withdrawn.

2. There is no dispute that this application is timely.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. Having regard to the agreement of the parties, the Board further finds that the unit of employees appropriate for collective bargaining should be framed as follows:

all employees of the respondent in the City of London, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

5. The parties are in agreement on the *description* of the appropriate bargaining unit, but they are not entirely agreed about its *composition*. The union claims that Ray Battersby and Randy Fowler exercise "managerial functions" and, consequently, are not "employees" within the meaning of the Act. The respondent asserts that neither of these workers is "managerial". We will return to that issue below.

II

6. In support of its application for certification, the trade union filed documentary evidence of membership on behalf of more than fifty-five percent of the employees in the above-mentioned bargaining unit. This documentary evidence took the form of membership cards, which consist of a combination application for membership and an attached receipt. Each card is signed by the subject employee, the receipts are countersigned by a witness, and the documents confirm that a payment of \$5.00 has been made to the union in respect of its membership fees. This \$5.00 payment is in the nature of consideration and confirms the act of signing.

7. The documentary evidence is supported by a properly completed Form 9, Statutory Declaration, attesting to its regularity and sufficiency. There is no allegation of any defect in form, nor is there any alleged impropriety in the manner in which this evidence was solicited. Certainly there is nothing to call into question the "voluntariness" of the individual acts of signing, or to suggest that, when the employees signed these cards, they were not unequivocally designating the union to represent them. Accordingly, the evidence meets the requirements of sections 1(1)(l) and 103(2)(j) of the Act, and demonstrates a level of "membership support" in excess of that required for certification without recourse to a representation vote (see sections 7(2) of the Act).

8. However, there was also filed with the Board a "petition" signed by a number of employees and indicating that those employees oppose the union's certification. This petition contains the names of several employees who have also signed union membership cards. The respondent and the objectors assert that these "members" have had a change of heart, and now no longer support the union's certification. They urge the Board to exercise its discretion to order a representation vote to resolve the question of representation.

9. The union replies that the petition document is totally unreliable because of the manner in which the signatures were collected, and the absence of confirmatory evidence of the kind required by the Rules. The union concedes that its support is not unanimous, but maintains that there is no credible basis for discounting the documentary evidence of membership from a "clear majority" of the employees. In the union's submission there is no need for a representation vote, and this case should not be delayed any further.

III

10. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its *documentary evidence of membership*. Rule 73 reads as follows:

73.-(1) *Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,*

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

(2) *No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).*

(3) Any employee or group of employees affected by an application for certification or by a declaration of termination of bargaining rights and desiring to make representations to the Board in opposition to the application may file a statement in writing of such desire in the form prescribed by subsection (1) not later than the terminal date for the application, but this subsection does not apply where the Board grants a request that a pre-hearing representation vote be taken.

(4) An employee or group of employees who has filed a statement of desire in the form and manner required by this section may appear and be heard at the hearing or, in the case of an application to which sections 87 to 99 apply, at any hearing directed by the Board, in person or by a representative.

(5) *The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,*

- (a) *the circumstances concerning the origination of the statement of desire; and*
- (b) *the manner in which each signature on the statement of desire was obtained.*

The Board does not solicit *viva voce* opinions about trade union representation, nor, in this jurisdiction is a representation vote the primary vehicle for testing the wishes of a group of employees or securing the right to represent them. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent, and to protect the employees from possible employer reprisals the anonymity of the union supporters is preserved (see section 111 of the Act). Representation votes are a residual mechanism required only when the union cannot demonstrate a “clear majority” (i.e. more than fifty-five per cent of the employees), or where, in the Board’s discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a timely “petition” indicating a purported change of heart by employees who have previously signed union membership cards.

11. The Board must be satisfied however, that when these union supporters sign a petition indicating an apparent change of heart, they were doing so voluntarily, and were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer or result in reprisals. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Was it motivated by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with the petition document? An employee can be reasonably assured that his personal support for the union will not be communicated to his employer but he may have no such assurance when presented with a petition opposing the union. The petition is a personal and public declaration of opposition to the union, but the refusal to sign it may be taken as an equally personal and public declaration of support. And the employee is being asked to declare his allegiance to individuals who in their opposition to the union are aligned in interest with the employer.

12. Of course, the mere identity of interest between the employer and the objecting employees is not sufficient, in itself, to link the petition with management in the minds of reasonable employees, or undermine the reliability of the signatures placed on it. There must be more than that, and each case must be considered on its own merits. On the other hand, in the Board’s experience there are enough instances where employers have committed unfair labour practices, or

have sponsored or supported anti-union petitions, that these employee fears cannot be discounted. That is why the Act itself protects the confidentiality of these expressions of employee opinion (again see section 111). The Legislature has specifically recognized these employee concerns and fears.

13. It is for this reason that the Board undertakes the inquiry contemplated by Rule 73(5) of the Rules of Practice, in order to satisfy itself from the circumstances of the origination, preparation, and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of this inquiry in a long passage to which we might usefully refer:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the “sudden change of heart” by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed in support of the union. The Board’s approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

“In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.”

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.* and *Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

Reference might also be made to the following passage from *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, where the Board reaffirmed its approach to such employee statements:

Before reviewing each of these issues it is useful to understand the general legal and policy background against which petitions are considered by this Board. There is usually and naturally an identity of interest between an employer and those of his employees interested in opposing an applicant trade union. In this context the circulation of a statement of desire involves petitioners approaching their fellow employees to solicit support. Understandably, an employee so approached may worry or feel anxious that his refusal to sign such a petition will become known to his employer given this natural interest employers have in employees opposing the trade union. But, this identity in interest between employer and opposing employees, standing alone, has never been viewed by this Board as undermining the reliability of signatures places on a circulated petition. If this were not so, a petition could never be found to be voluntary. On the other hand, this is not to say that a similarity in interest between employer and petitioners is

irrelevant and, indeed, it is the reason why this Board subjects the origination and circulation of a statement of desire in opposition to an application for certification to considerable scrutiny. There is an onus on those employees who present the documentary evidence to the Board to demonstrate that the signatures contained therein constitute a voluntary expression of the wishes of those employees who on recent and earlier occasion joined the applicant trade union. It is in this context that the Board, in the often cited *Pigott Motors (1961) Ltd.* case, 63 CLLC ¶16,264, made the following observations:

• • •

41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

IV

14. These applications were filed on November 21, 1990 and came on for hearing before the Board on December 21, 1990. A good part of that day was consumed by the parties' efforts to sort out the identity of the employer(s) and the description and composition of the bargaining unit(s). This ultimately involved the amalgamation of the two files and the creation of a composite employee list, for the purpose of assessing the union's membership support. That done, the case began with the objectors' evidence concerning the origination, preparation and circulation of their petition (see Rule 73(2) and (5) above).

15. Frank Spada was the first and ultimately the only witness called on behalf of the objecting employees. By the end of the day, Mr. Spada had given his evidence "in-chief", and counsel for the union had begun her cross-examination. On the agreement of the parties, the case was scheduled to continue on April 22 and April 23, 1991. It was anticipated that two days would be sufficient to complete Mr. Spada's cross-examination, as well as entertain any other evidence which the parties might wish to adduce.

16. At the opening of the hearing on April 22, however, counsel advised the Board that Mr. Spada was not available for cross-examination that day, and that he (counsel) was unable to say when Mr. Spada would be available. Counsel put before the Board a Declaration, in which Mr. Spada asserts that for medical reasons he is unable to be present for the hearing and that, in any event, "pain makes concentration on any matter extremely difficult". The Declaration also reads in part:

"I am unable at this time to furnish a precise diagnosis of my medical condition and I am unable to indicate specifically when I would expect to be in a position to continue my evidence"

No medical report or opinion is attached to this Declaration nor were the parties or the Board able to assess Mr. Spada's condition or determine when, if at all, he would be able to complete his testimony.

17. Counsel for the objectors argued that, in the circumstances, it was appropriate to

adjourn the case since Mr. Spada was both his advisor and the key witness tendered on behalf of the objectors pursuant to Rule 73(2) and (5). Counsel for the union resisted that adjournment request, pointing out that time was of the essence in certification matters, there had been ample opportunity between December and April to apprise the parties and the Board of the witness's condition, and any last minute rescheduling of agreed upon hearing dates would inevitably result in a further delay of some months. The union noted that on the evidence before it, the Board was simply unable to determine when, or even whether, Mr. Spada would be available, so that the request was really for an indefinite adjournment or adjournment *sine die*.

18. The Board made the following oral ruling which is hereby recorded and confirmed:

"Time is of the essence in labour relations matters - particularly those involving representation. This has been consistently confirmed both by the Board and the Court of Appeal in such cases as the *Ottawa Journal*, [*Journal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild et al.*, unreported March 31, 1977 per Estey C.J.O.] and *Nick Mansey Hotels Ltd.*, [1973] OLRB Rep. 461. [see also *Re Flamborodowns Holdings Ltd. and Teamsters Local 879*, (1979) (24) O.R. 2d 400]. In *Nick Mansey Hotel*, Laskin J.A., as he then was observed:

"The Ontario Labour Relations Board deals in certification matters with fluid situations which cannot be judged by the more leisurely standards that operate in the prosecution of a claim for damages for a tort or for a breach of contract where the situation is fairly well frozen when the tort or the breach of contract has occurred. Expedition is important to the union, to employees and to an employer, since the certification is merely the first step in an often laborious collective bargaining process.

It is against that background that we must consider this request for an adjournment; and, as all counsel have indicated, the rules of natural justice must be measured and applied having regard to the facts of the particular case.

What then is the situation here?

Mr. Spada is the representative of the objecting employees, the advisor of counsel, and the first and principal witness on behalf of the petitioners. He has given his evidence in-chief and is in the midst of cross-examination. This case was last heard on December 21, and was scheduled to proceed today and tomorrow, which are the dates to which all parties have agreed. We are now advised however that Mr. Spada is unable to be present this morning because of a degenerative back condition over which he has no control.

The difficulty is that on the basis of the material provided, and assuming it to be true, there is no indication that Mr. Spada will be available to complete his evidence in weeks, or months, or at all. In short, the objectors are asking for an adjournment for an indefinite period which will necessarily engender some months delay together with the possibility that the parties may be in precisely the same position in which they find themselves this morning. Any adjournment would necessarily delay this matter for several months, and even then we would have no assurance that the matter would be completed. On the other hand, the union is anxious to proceed, Mr. Spada is apparently reachable by telephone, and the union is content to have counsel for the objectors discuss Mr. Spada's evidence with any witnesses previously excluded and to choose an alternative advisor should they consider this necessary. The union opposes any adjournment, because of the prejudice which will inevitably arise.

In the circumstances and having considered the competing considerations in issue, we are not persuaded that the case should be adjourned. We are prepared, however, to adjourn this matter to 1:00 p.m. so that counsel can seek further instructions from such other witnesses as are available. Those witnesses are released, as is counsel, from any restrictions on such discussions."

In all the circumstances the Board was not prepared to grant an indefinite adjournment, involving significant and prejudicial delay, with no assurance that the situation would be substantially improved some weeks or months later.

19. Following the morning adjournment, counsel for the objectors advised the Board and the other parties that the objectors would not be calling any other evidence with respect to the origination, preparation or circulation of the petition. In that respect, his case was closed. The parties then took the rest of the afternoon to put together a written agreement of fact concerning the alleged “managerial” status of Randy Fowler and Raymond Battersby - the individuals whose status the union had challenged. In the result, the only evidence concerning the of the petition put before the Board pursuant to Rule 73(5) is that of Frank Spada, and that testimony has not been tested by cross-examination.

V

20. Mr. Spada told the Board that he shares an office with a member of management but has no managerial responsibilities himself. He first learned of the union’s certification application from an acquaintance who works in the office, and he made his way to his present counsel through family connections. According to Mr. Spada, his lawyer advised him that signatures should not be solicited on company premises or during working hours, and in circulating the petition he followed that advice. He collected signatures between December 4 and December 6 at various times and places during the day and night, visiting employees at their homes or intercepting drivers on the road.

21. Mr. Spada indicated that Raymond Battersby was involved in circulating the petition from the very outset. Mr. Battersby was present when 19 of the 26 signatures were solicited, actively encouraged employees to sign the petition, and arranged meetings so that they could do so. In several cases, Mr. Battersby was the only one immediately present when the employee signature was collected. Mr. Spada travelled from place to place with Mr. Battersby in the latter’s van. Mr. Battersby arranged with his brother Richard to obtain a mobile phone which he then used together with the company’s dispatching system to contact drivers who were not at work. Ray Battersby also organized a meeting of about a dozen employees at a local bar where he and Mr. Spada addressed the employees about the union’s organizing campaign and the problems at work. We do not know precisely what was said because Mr. Spada’s evidence is incomplete on that point and Mr. Battersby did not give evidence at all about his role in the petition process. Nor do we know what Mr. Battersby said to these employees whose signatures he witnessed, or to the employees with whom meetings were arranged.

22. Raymond Battersby is the brother of Jack Battersby the President and owner of the respondent company.

23. On the evidence before us, we cannot conclude that Ray Battersby exercises managerial functions; however, he obviously stands in a special relationship to the owner of the company, and would be so regarded by any employee approached. Randy Fowler does not exercise managerial functions either; but, he was a foreman only two or three months before the union’s organizing campaign, he is currently described as a “lead hand” who occasionally “fills in” for management personnel, and he is the brother of Robert Fowler who is described as the “manager” of the Joe Dees aspect of the company’s operation. Randy Fowler’s name appears on the top of the second page of the petition. His precise involvement (if any) is unclear. All that can be said is what would be apparent to any employee: another individual with managerial connections is part of the anti-union opposition group, which the individual is being invited to join or reject.

24. As we have already mentioned, we do not know what Mr. Battersby had to say to employees either before or at the time of their signing the petition. If Mr. Spada is believed however, we do know that certain employees *who had already signed union membership cards*, declared themselves to be “neutral”, or told him that they had not heard of or were opposed to the

union. One could only speculate about why they would make those false statements to Mr. Spada and Mr. Battersby, but one obvious possibility is their reluctance to identify their union affiliation to the owner's brother.

25. In summary, then, the petition document in this case is supported only by the incomplete testimony of Mr. Spada; and while it is true to say (as counsel does) that this testimony is "uncontradicted", neither was it subjected to the test of cross-examination. For that reason alone, we would be inclined to assign it very little weight, bearing in mind that pursuant to Rule 73(5) the Board is specifically permitted to reject any petition which is unsupported by credible affirmative evidence as to its origination and circulation. In addition, even if accepted in its limited form, the evidence establishes that the brother of the company's owner was intimately involved in circulating the petition, as well as arranging for and persuading employees to sign; moreover, in some instances Mr. Battersby was the *only* person who was in a position to say what transpired at the point of signing.

VI

26. Having regard to the foregoing, the Board finds that more than fifty-five per cent of the employees in the above - noted bargaining unit, at the time the application was made, were members of the union on December 7, 1990, the terminal date, and the date which the Board fixes pursuant to section 103(2) of the Act to be the date for determining membership evidence for the purposes of section 7 of the Act. On the basis of the totality of the evidence before it, the Board is not persuaded that it should exercise its discretion under section 7(2) to direct the taking of a representation vote.

27. A certificate will therefore issue to the applicant union in respect of the bargaining unit described in paragraph 4.

28. On the basis of the evidence adduced or agreed to by the parties, it is the opinion of the Board that Randy Fowler and Raymond Battersby do *not* exercise "managerial functions" within the meaning of section 1(3)(b) of the Act. They do have certain co-ordinating and reporting duties in the nature of those exercised by a "lead hand", but they are not properly regarded as members of "management" excluded from the process of collective bargaining by section 1(3)(b) of the Act.

2910-90-R James Patterson, Applicant v. Retail, Wholesale and Department Store Union, Local 414, Respondent v. Western Inventory Service Ltd., Intervener

Petition - Termination - Surrounding circumstances leaving Board unpersuaded that petition supporting termination application representing voluntary wishes of all those who signed it - Application dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. H. Wightman* and *D. A. Patterson*.

APPEARANCES: *C. J. Abbass* and *James Patterson* for the applicant; *Eric del Junco* for the respondent; *Brett Christen*, *N. Ford* and *P. Melady* for the intervener.

DECISION OF ROBERT HERMAN, VICE-CHAIR, AND BOARD MEMBER, D. A PATTERSON: June 25, 1991

1. This is an application for termination of bargaining rights made pursuant to section 57 of the Act. There is no dispute that the instant application is timely.
2. At the conclusion of the hearing, the majority of the Board orally ruled, with reasons to follow, that the petition was involuntary and that the application was dismissed. We hereby provide our reasons.
3. This is the fourth application for termination that has been filed, with respect to the same bargaining unit, within a period of approximately three months. The first three applications were all filed by another employee in the bargaining unit, Steve Cochrane. The first application filed by Mr. Cochrane was untimely, and was dismissed on that basis, without a full hearing, by the Board. The second application filed by Mr. Cochrane (Board File No. 2353-90-R), was dismissed after a hearing, on the basis that the petition was found on the evidence to be involuntary. Two matters relied upon by the Board in its decision dismissing that application remain relevant. After the first termination application had been filed by Mr. Cochrane, on November 6, 1990, he posted a notice on the employee's bulletin board. That notice clearly indicated his opposition to the union and his view that an employee association should be formed. The company allowed Mr. Cochrane's notice to remain posted for approximately three weeks. In contrast, the company took immediate steps to remove a notice posted by a union supporter. Second, shortly after Mr. Cochrane's anti-union notice was posted, in early December, the employer set up an employee committee and selected Mr. Cochrane to be one of its members.
4. Both these events would have made clear to employees that the company was opposed to the union as bargaining agent. These factors, as noted, formed part of the reason for the Board's dismissal of the earlier application. That decision of the Board was dated January 28, 1991.
5. The applicant in the instant proceeding, James Patterson, had been an employee of the company only since mid-December, 1990. After going to a meeting of employees, called by the union, in order to ratify the collective agreement, Mr. Patterson decided to oppose the union. He then spoke to Steve Cochrane, the applicant from the first two termination applications. At the time they spoke, Mr. Cochrane had already filed his third termination application. He did so two days after the decision dismissing the second application. Mr. Cochrane advised Mr. Patterson about the steps necessary to decertify the union. Mr. Cochrane handed over to Mr. Patterson a number of the termination documents which he had. On February 7, 1991, the instant application was filed. No petition had yet been started (with respect to this application). On February 12, 1991, Mr. Cochrane's application (his third) was withdrawn.
6. Mr. Patterson learned, on the evening of February 11, 1991, that the union and the company were holding a meeting the next morning at the local Holiday Inn. That same evening, Mr. Patterson phoned up a number of employees to encourage them to join him the next day in picketing the union at the meeting with the company. For those employees scheduled to work the next day, Mr. Patterson suggested that they phone the company and book off work. A number of them expressed some concerns about whether the company would penalize them for doing so.
7. The next morning, approximately eleven of the 34 employees showed up at the company's premises, and together they went to the Holiday Inn. At the Holiday Inn, Mr. Patterson and Mr. Cochrane, and one other employee, approached the company negotiators to express their dissatisfaction with the union representation and to request that a representation vote be held. The company advised them, in effect, that only the union could assist them with that. The company

spokespeople expressed no concern about the employees being on “strike” or missing work, nor about any disruptions to work that their anti-union protest might have caused. The employees then spoke to the union officials, but were rebuffed in their request. It was clear to the company and to the employees present at the hotel that Mr. Patterson was the leader of the group of striking employees and that the strike was to oppose the union, not the company. It would also have been clear that Mr. Cochrane was associated with Mr. Patterson in this protest.

8. The next day the company had posted on the bulletin board a notice addressed to all the employees of the Toronto crew, and not only those who had engaged in the strike and picketed the union. That notice indicated that the company’s work schedule had been interrupted and that the company had to make alternative arrangements to service its customers. The notice further indicated that the company viewed this as a strike by the employees. The company advised employees that the actions “of those employees who engaged in the strike of February 12, 1991 are not condoned by the company.” Other than the posting of this notice in the work place, addressed to all employees, the company took no action whatsoever with respect to the strike, nor any action against Mr. Patterson. There is no evidence that striking employees who were scheduled to work were even docked their pay for that day.

9. Within the next week or so, Mr. Patterson had started and circulated the petition and obtained all the signatures upon it.

10. In these circumstances, we are satisfied that the petition does not express the voluntary wishes of the employees. Employees would have been well aware, from the events in November of 1990, when Mr. Cochrane’s anti-union notice remained on the company bulletin board for several weeks, that the company opposed the union and was prepared to take some steps to promote anti-union views. They would have been reinforced in that view when Mr. Cochrane was shortly thereafter chosen by the company as a member of the Crew Committee, the employee association set up by the company to represent the employees. In this context, Mr. Patterson meets with Mr. Cochrane to learn how to decertify the union. But this time, the fourth in 3 months, Mr. Cochrane decides to remain behind the scenes. So Mr. Patterson files this application. He has only been working with the company for approximately one and a half months. When the company and the union have a negotiation session scheduled, he phones up employees and encourages them to book off work and join him in a strike against the union. At the strike, this new employee is seen together with Mr. Cochrane, the individual whom employees would have perceived as being linked to management. Indeed, in part this perceived link was the reason for Mr. Cochrane not being an applicant. At the meeting site, the company in no way objects to the employees not working or to them opposing the union. Indeed, it directs them to the union. The company never takes any action against the employees who were picketing. It merely posts a notice to all employees indicating that it does not condone the activity.

11. There would be no question in the minds of employees that Mr. Patterson was associated with Mr. Cochrane. And there would be no question as to the company’s position with respect to the union representation, and the fact that the company had taken and was continuing to take action in support of that view. Employees would be under pressure to oppose the union. They would perceive Mr. Patterson and Mr. Cochrane as linked with management.

12. In all these circumstances, we are not persuaded that the written statement supporting this application represents the voluntary wishes of all those who signed it. Accordingly, and for the above reasons, this application was dismissed.

1. As indicated at paragraph 8 of the majority decision the company chose to describe the activities of February 12, 1991 as a "strike" in the notice to employees. Whether the activity constituted a "strike", and if so, whether the "strike" was lawful or unlawful, and whether or not the conduct was a protected activity under the *Act* we perhaps shall never know because only the Board can make those determinations and, thusfar at least, those issues have never been put before the Board for determination.

2. In the circumstances I see nothing unusual in the company being disinclined to take punitive action. Moreover, notwithstanding the reasons for the failure of three previous termination applications (by a different individual), in the face of those applications, I can agree that employees no doubt concluded that the company is opposed to the union. I could also understand that the company may have concluded that neither is the union in full command of the hearts and minds of all employees. But none of this persuades me that there are not a substantial number of employees whose wish it is to have the union's support tested via a secret ballot and I would have so ordered.

COURT PROCEEDINGS

0310-87-R (Court File No. 21675) Cuddy Chicks Limited, Appellant v. Ontario Labour Relations Board and United Food and Commercial Workers International Union, Local 175, Respondents and Attorney General of Canada, Attorney General for Ontario, Attorney General for Saskatchewan, Canada Employment and Immigration Commission and Marcelle Tétreau-Gadoury, Interveniers

Certification - Charter of Rights and Freedoms - Constitutional Law - Judicial Review - Board holding that it has jurisdiction to entertain union's challenge that *Labour Relations Act's* exclusion of persons employed in agriculture is contrary to the *Charter* - Employer application for judicial review dismissed by Divisional Court and appeal dismissed by Court of Appeal - Further appeal dismissed by Supreme Court of Canada - Supreme Court holding that an administrative tribunal given the power to interpret law holds concomitant power to determine whether that law is constitutionally valid

Board decision reported at [1988] OLRB Rep. May 468; Divisional Court decision reported at (1988), 66 O.R. (2d) 284; Court of Appeal decision reported at [1989] OLRB Rep. Sept. 989.

Supreme Court of Canada, Lamer C.J.C., and Wilson, LaForest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ., June 6, 1991.

Reasons for judgment by LaForest J. concurred in by Lamer C.J.C., and Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

Concurring Reasons by Wilson J. concurred in by L'Heureux-Dubé J.

LA FOREST J.: This appeal concerns the jurisdiction of the Ontario Labour Relations Board to determine the constitutionality of a provision of its enabling statute, the *Labour Relations Act*, R.S.O. 1980, c. 228, in the course of proceedings before it.

Facts

In April 1987, the United Food and Commercial Workers International Union, Local 175 filed an application for certification before the Ontario Labour Relations Board (OLRB) relating to employees at the chicken hatchery of Cuddy Chicks Limited. Section 2(b) of the *Labour Relations Act* states that the Act does not apply “to a person employed in agriculture”. On filing the application, the Union gave notice that, if the employees were found to be agricultural employees, it would request the Board to hold s.2(b) invalid as being contrary to ss.2(d) and 15 of the *Canadian Charter of Rights and Freedoms*. The position of Cuddy Chicks was that the employees in question were agricultural employees.

Prior to the commencement of the hearing into this matter, Cuddy Chicks disputed the jurisdiction of the Board to subject its enabling statute to *Charter* scrutiny. At that point, in February 1988, a separate hearing was convened to determine whether the panel had jurisdiction to entertain the *Charter* issues raised by the Union. The decision of this second panel was reserved. The hearing by the first panel proceeded in March and April 1988. At the conclusion of this hearing, the panel unanimously held that the employees at the Cuddy Chicks hatchery were employed in agriculture, and therefore the Act did not apply. A majority of the panel then held that the Board had jurisdiction to rule on the *Charter* issue because, in the majority’s view, the Board is a “court of competent jurisdiction” within the meaning of s.24(1) of the *Charter* and because s.52 of the *Constitution Act, 1982* imposes an obligation on the Board to ensure that the law it applies is consistent with the supreme law of Canada. Under s. 106(1) of the Act, the Board has jurisdiction to decide questions of law relevant to the proceedings before it:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Judicial History

Divisional Court

The Divisional Court held that the Board had jurisdiction to deal with the *Charter* issue, on three grounds. First, the Board was a court of competent jurisdiction under s.24(1) of the *Charter*, since it had jurisdiction over the parties, subject matter and remedy and thus met the test set out in *Mills v. The Queen*, [1986] 1 S.C.R. 863. Second, it had jurisdiction to consider *Charter* issues under s.52(1) of the *Constitution Act, 1982*. The court noted that prior to the *Charter*, labour boards were held competent to determine constitutional questions, such decisions being subject always to judicial review. The third basis on which the court found jurisdiction in the Board was the common law duty of labour boards to construe external statutes in the course of rendering decisions on labour matters before them.

Court of Appeal (Grange, Finlayson and McKinlay JJ.A.) (1989), 70 O.R. (2d) 179

A majority of the Court of Appeal (Grange and McKinlay JJ.A.) held that s.52(1) of the *Constitution Act, 1982* conferred jurisdiction on the Board to decide the constitutionality of its enabling statute. In construing the *Charter* in favour of the Union in the present case, the Board would not be issuing a declaration of invalidity, but merely including agricultural workers within its broad jurisdiction under the Act to certify unions. Accordingly, a remedy was available in the ordinary

course of proceedings, and resort to s.24 of the *Charter* was unnecessary. It was also unnecessary to address the issue of common law duty.

Finlayson J.A. in dissent held that the Board was not a court of competent jurisdiction under s.24(1) of the *Charter*. While it has jurisdiction over the union and employer, as well as the remedy of certification, once the Board determined that the employees at the Cuddy Chicks hatchery were agricultural employees, it had no jurisdiction over the subject matter of the application and exhausted its jurisdictional competence. McKinlay J.A. agreed that the Board was not a court of competent jurisdiction, although in her view, it was unnecessary to decide that issue.

As to whether s. 52 of the *Constitution Act, 1982* alone confers authority on the Board to apply the *Charter*, Finlayson J.A. held that although that provision does give the Board the authority to apply the *Charter*, it does not give it jurisdiction to strike down, ignore or treat as inoperative any provision of its enabling statute by reference to the *Charter*.

Following its unsuccessful appeals in the Ontario courts, Cuddy Chicks obtained leave to appeal to this Court. Interventions were filed by the Attorneys General for Ontario and Saskatchewan. In addition, the parties to *Canada Employment and Immigration Commission v. Tétreault-Gadoury*, an appeal which originally was to be heard together with the present appeal, were permitted to intervene by order of the Chief Justice.

Issues

The issues as framed by the parties are as follows:

1. Did the Ontario Court of Appeal err in holding that s.52 of the *Constitution Act, 1982* conferred the right and duty on an administrative agency such as the OLRB to decide the constitutional validity of its enabling statute?
2. Did the Ontario Court of Appeal err in holding that the OLRB has the jurisdiction to decide the constitutional validity of s.2(b) of its enabling statute by applying the *Charter* as part of a duty it has to consider statutes bearing on proceedings before it?
3. Was the Ontario Court of Appeal correct in holding that the OLRB was not a “court of competent jurisdiction” under s.24(1) of the *Charter*?

Discussion

The essential issue before this Court is whether and on what basis the Board has jurisdiction to determine the constitutional validity of s.2(b) of the *Labour Relations Act*, its enabling statute. This Court was not called upon to decide the substantive issue of whether s.2(b) of the Act violates the *Charter*.

The power of an administrative tribunal to consider *Charter* issues was addressed recently by this Court in *Douglas/Kwantlen Faculty Ass. v. Douglas College*, [1990] 3 S.C.R. 570. The case concerned the jurisdiction of an arbitration board, appointed by the parties under a collective agreement in conjunction with the British Columbia *Labour Code*, to determine the constitutionality of a mandatory retirement provision in the collective agreement. In ruling that the arbitrator did have such jurisdiction, this Court articulated the basic principle that an administrative tribunal which

has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. This conclusion ensues from the principle of supremacy of the Constitution, which is confirmed by s.52(1) of the *Constitution Act, 1982*:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Distilled to its basics, the rationale for recognizing jurisdiction in the arbitrator in the *Douglas College* case is that the Constitution, as the supreme law, must be respected by an administrative tribunal called upon to interpret law. In addition, the practical advantages of having constitutional issues decided at first instance by an expert tribunal confirm if not compel this conclusion. Practical considerations were canvassed at length in *Douglas College* and I need not repeat that discussion here. I would simply note the relevance of such considerations to the determination of whether, in the end, it makes sense for an administrative tribunal to decide whether a particular law is invalid because it violates the *Charter*.

It is essential to appreciate that s.52(1) does not function as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. Section 52(1) affirms in explicit language the supremacy of the Constitution but is silent on the jurisdictional point *per se*. In other words, s.52(1) does not specify which bodies may consider and rule on *Charter* questions, and cannot be said to confer jurisdiction on an administrative tribunal. Rather, jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought. While this analytical framework mirrors the requirements for a court of competent jurisdiction under s.24(1) of the *Charter* as outlined in *Mills v. The Queen*, *supra*, as was the case in *Douglas College*, it is unnecessary to have recourse to s.24(1) to determine whether the Board has jurisdiction over *Charter* issues. An administrative tribunal need not meet the definition of a court of competent jurisdiction in s.24(1) of the *Charter* in order to have the necessary authority to subject its enabling statute to *Charter* scrutiny. In the present case, the relevant inquiry is not whether the tribunal is a "court" but whether the legislature intended to confer on the tribunal the power to interpret and apply the *Charter*.

Application to this Case

It first must be determined whether the Board has jurisdiction over the whole of the matter before it. It is clear that it has jurisdiction over the employer and the union. The issue here centres on its jurisdiction over the subject matter and remedy. The subject matter before the Board cannot be characterized simply as an application for certification, which would certainly fall within the authority of the board. This is an application which requires the Board to subject s.2(b) of the Act to *Charter* scrutiny in order to determine whether the application for certification is properly before it. Similarly, the remedy of certification requires the Board to refuse to give effect to s.2(b) of the Act because of inconsistency with the *Charter*. Since the subject matter and remedy in this case are premised on the application of the *Charter*, the authority to apply the *Charter* must be found in the Board's enabling statute.

Section 106(1) of the *Labour Relations Act* stipulates that the Board has exclusive jurisdiction "to determine all questions of fact or law that arises in any matter before it...." The legislature expressly, and without reservation, conferred authority on the Board to decide points of law. In addition, the Act confers powers on the Board to determine questions of law and fact relating to its

own jurisdiction. Section 124, for example, gives it authority to decide if a matter is arbitrable. The issue, then, is whether this authority with respect to questions of law can encompass the question of whether a law violates the *Charter*. It is clear to me that a *Charter* issue must constitute a question of law; indeed, the *Charter* is part of the supreme law of Canada. This comports with the view expressed in *Douglas College* that the statutory authority of the arbitrator in that case to interpret any "Act" must include the authority to interpret the *Charter*. In the result, the board has the authority to apply the *Charter* and to rule on the constitutionality of s.2(b) of its enabling statute, in the course of the Union's application for certification.

Practical Considerations

The discussion of practical consideration in the *Douglas College* decision entailed an analysis of the institutional characteristics of administrative tribunals, such as their narrow range of expertise and the speed with which they deal with matters, in relation to the fundamental and often complex nature of *Charter* issues. This analysis concerned administrative tribunals in general, and the ultimate conclusion that practical concerns favour the finding of jurisdiction in administrative tribunals holds in the present case. My purpose here is not to rehearse the comprehensive discussion, but simply to identify those considerations which are more pronounced in the particular case of the Board.

The overarching consideration is that labour boards are administrative bodies of a high calibre. The tripartite model which has been adopted almost uniformly across the country combines the values of expertise and broad experience with acceptability and credibility. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* [1979] 2 S.C.R. 227, at pp. 235-36, Dickson J. (as he then was) characterized the particular competence of labour boards as follows:

The labour board is a specialized tribunal which administers a comprehensive statute regulation labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. Therefore, while Board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues. The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. This is evidenced clearly by the weight which the judiciary has given the factual record provided by labour boards in division of powers cases; see, for example, *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733.

That having been said, the jurisdiction of the Board is limited in at least one crucial respect: it can expect no curial deference with respect to constitutional decisions. Furthermore, a formal declaration of invalidity is not a remedy which is available to the Board. Instead, the Board simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior courts, the ruling of the board on a *Charter* issue does not constitute a binding legal precedent, but is limited in its applicability to the matter in which it arises.

An additional practical consideration which bears mention here is whether the Attorney General of the province will participate in proceedings before an administrative tribunal. Before the courts, a provision to obtain this participation exists. Finlayson J.A. commented that this sort of participa-

tion may be inappropriate in the case of tribunals established by government, but at the same time the lack of participation of the Attorney General unfairly places the burden of defending legislation on the parties. However, the Attorney General for Ontario expressed a willingness to intervene and make submissions in appropriate cases, and has in the past done so before the board on issues of federalism under the *Constitution Act, 1867*. To the extent that the Attorney General will intervene, the relative disadvantage of administrative tribunals versus courts is lessened.

It is apparent then that an expert tribunal of the calibre of the Board can bring its specialized expertise to bear in a very functional and productive way in the determination of *Charter* issues which make demands on such expertise. In the present case, the experience of the Board is highly relevant to the *Charter* challenge to its enabling statute, particularly at the s.1 stage where policy concerns prevail. At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s.2(b) of the *Labour Relations Act*.

This view also makes sense within the larger context of Canadian constitutional jurisprudence. The capacity of labour boards to consider constitutional questions relating to their own jurisdiction has long been recognized. An early expression of this principle is found in *The Queen v. Ontario Labour Relations Board, Ex parte Dunn* (1963), 39 D.L.R. (2d) 346 (Ont. H.C.), a case which was cited by Estey J. in *Northern Telecom Canada Ltd. v. Communication Workers of Canada, supra*, at p.756, in support of the jurisdictional competence of labour boards in constitutional matters:

McRuer C.J.H.C., in giving judgment, made reference at p.307 to the limited but important role to be played by the administrative agency in the determination of the constitutional questions:

The Board cannot judicially determine constitutional questions but it has power to entertain an objection to its jurisdiction on constitutional grounds and to have the grounds of the objection stated.

See also *Canada Labour Relations Board v. Paul L'Anglais Inc.* [1983] 1 S.C.R. 147, and *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031.

What these cases speak to is not only the fundamental nature of the Constitution, but also the legal competence of labour boards and the value of their expertise at the initial stages of complex constitutional deliberations. These practical considerations have compelled the courts to recognize a power, albeit a carefully limited one, in labour tribunals to deal with constitutional issues involving their own jurisdiction. Such considerations are as compelling in the case of *Charter* challenges to a tribunal's enabling statute. Therefore, to extend this "limited by important role" of labour boards to the realm of the *Charter* is simply a natural progression of a well established principle.

Disposition

In the application for certification brought by the Union, the Board had jurisdiction over the parties, subject matter and remedy. In the exercise of this jurisdiction, it was required to respect the supremacy of the Constitution as expressed in s.52(1) of the *Constitution Act, 1982* and had a duty to subject its enabling statute to *Charter* scrutiny. It is unnecessary to consider whether the Board is a court of competent jurisdiction within the meaning of s.24(1) of the *Charter*.

I would dismiss the appeal with costs.

WILSON J.: In my concurring reasons in *Douglas/Kwantlen Faculty Ass. v. Douglas College*,

[1990] 3 S.C.R. 570, I agreed with my colleague Justice La Forest that an Arbitration Board appointed by the parties under the Labour Code, R.S.B.C. 1979, c. 212, had jurisdiction, by virtue of s.52(1) of the Constitution Act, 1982, to determine the Charter issue raised by the grievance and that it was not necessary in that case to determine whether the Board was a “court of competent jurisdiction” within the meaning of s.24(1) of the Canadian Charter of Rights and Freedoms. I added the following qualification to my concurrence at p. 606:

I would, however, prefer to leave open the question whether a tribunal may have such jurisdiction even in the absence of specific provisions in the governing legislation and in the collective agreement such as those heavily relied on by my colleague.

In the present appeal my colleague has re-stated the position he took in *Douglas College* that the authority to apply the Charter must be found in the tribunal’s enabling statute and he has found once again that its jurisdiction is found there, that the broad jurisdiction conferred on the Board by s.106(1) of the Labour Relations Act, R.S.O. 1980, c. 228, includes the authority to interpret the Charter.

In concurring with my colleague in the present appeal I would accordingly wish once again to add the qualification which I added to my concurrence in *Douglas College*. The absence of legislative authority to deal with the Charter issue in the governing statute is not, in my view, necessarily determinative of a tribunal’s jurisdiction, since the authority and obligation to apply the law may be grounded elsewhere: *McLeod v. Egan*, [1975] 1 S.C.R. 517. Additionally, it may be necessary to proceed to s.24(1) of the Charter and decide whether, on the basis of the tests set out in *Mills v. The Queen*, [1986] 1 S.C.R. 863, the tribunal is a court of competent jurisdiction to decide a Charter issue arising in the context of the relief claimed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1364-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. M. Pickard Construction Co. Ltd. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in the County of Grey, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (23 employees in unit)

1983-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Oston Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Peterborough, save and except supervisors, persons above the rank of supervisor, office and sales staff, engineering staff, customer service staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (99 employees in unit) (*Having regard to the agreement of the parties*)

2535-90-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Drago Petrina Electrical Contractor Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all journeymen and apprentice electricians in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2756-90-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Don Gladu Electric (1991) Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry in within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3008-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Plan Mechanical Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (14 employees in unit)

3061-90-R: Canadian Union of Public Employees (Applicant) v. Ajax Public Library (Respondent)

Unit #1: “all employees of the respondent in the Town of Ajax, save and except department heads, branch heads, administrative secretary, administrative assistants, persons above those ranks and persons employed regularly for not more than 24 hours per week and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

Unit: “all employees of the respondent in the Town of Ajax regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department heads, branch heads, administrative secretary, administrative assistants, persons above those ranks” (37 employees in unit) (*Having regard to the agreement of the parties*)

3155-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Torwest Electric Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all journeymen electricians and registered apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen electricians and registered apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

3435-90-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Brantam Excavating Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0058-91-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Vandenburg Contracting (1982) Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0079-91-R: International Association of Machinists & Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Dominion Motors (Thunder Bay-1984) Ltd. (Respondent)

Unit: “all office employees of the respondent in the City of Thunder Bay, save and except foremen, persons above the rank of foremen, service salespersons, new and used car salespersons, janitors, tower operators, students employed during the school vacation period, students employed in a co-operative training program

and persons regularly employed for not more than 24 hours per week and persons who are covered by an existing collective agreement between the applicant and the respondent” (8 employees in unit) (*Having regard to the agreement of the parties*)

0092-91-R: Canadian Union of Public Employees (Applicant) v. Better Child Care Ontario, Inc. (Respondent)

Unit: “all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons in bargaining units for whom any trade union held bargaining rights as of April 3, 1991” (4 employees in unit) (*Having regard to the agreement of the parties*)

0117-91-R: Sudbury Mine, Mill & Smelter Workers Union, Local 598 of the Canadian Union of Mine, Mill & Smelter Workers (Applicant) v. Northern Non-Profit Housing (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Sudbury, save and except financial comptroller, persons above the rank of financial controller, and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0123-91-R: Ontario Public Service Employees Union (Applicant) v. St. Joseph’s Hospital, Brantford (Respondent)

Unit #1: “all paramedical employees of the respondent in the City of Brantford, save and except supervisors, persons above the rank of supervisor, professional medical staff, office, and clerical staff, students employed in a co-operative training program, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of April 10, 1991” (35 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all paramedical employees of the respondent in the City of Brantford regularly employed for not more than 24 hours per week and students employed during the school vacation period as paramedical employees, save and except supervisors, persons above the rank of supervisor, office and clerical staff, students employed in a co-operative training program, and persons in bargaining units for which any trade union held bargaining rights as of April 10, 1991” (11 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0149-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Prince Edward County Board of Education (Respondent)

Unit: “all employees of the respondent in Prince Edward County, save and except coordinator, persons above the rank of coordinator and those employees for whom any trade union held bargaining rights as of April 11, 1991” (12 employees in unit) (*Having regard to the agreement of the parties*)

0163-91-R: United Steelworkers of America (Applicant) v. Bucyrus Blades of Canada Ltd. (Respondent)

Unit: “all employees of the respondent in the Town of Lindsay, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff” (13 employees in unit) (*Having regard to the agreement of the parties*)

0178-91-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. Ontario Cancer Institute/Princess Margaret Hospital (Respondent)

Unit: “all security guards employed by the respondent in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

0179-91-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. Ontario Cancer Institute/Princess Margaret Hospital (Respondent)

Unit: “all security guards employed by the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

0180-91-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. The Wellesley Hospital (Respondent)

Unit: “all security guards regularly employed for not more than 24 hours per week, employed by the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor” (7 employees in unit) (*Having regard to the agreement of the parties*)

0181-91-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. The Wellesley Hospital (Respondent)

Unit: “all security guards employed by the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, regularly employed for not more than 24 hours per week” (10 employees in unit) (*Having regard to the agreement of the parties*)

0185-91-R: International Association of Machinists & Aerospace Workers (Applicant) v. 582021 Ontario Inc. c.o.b. as Print Three (Respondent)

Unit: “all employees of the respondent in the City of Toronto, save and except supervisors and persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

0197-91-R: Canadian Union of Public Employees (Applicant) v. St. Joseph’s General Hospital - Minden (Respondent)

Unit: “all employees of the respondent in Minden, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of April 15, 1991” (3 employees in unit) (*Having regard to the agreement of the parties*)

0198-91-R: Ontario Public Service Employees Union (Applicant) v. Participation Projects - Sudbury & District (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Sudbury, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and persons for whom any trade union held bargaining rights as of April 24, 1991” (41 employees in unit) (*Having regard to the agreement of the parties*)

0202-91-R: La Fédération des enseignantes-enseignants des écoles secondaires de l’Ontario (Ontario Secondary School Teachers’ Federation) (Applicant) v. Le Conseil des écoles séparées catholiques du district de Hearst (Respondent)

Unit #1: “tous les employés de l’intimé dans le District de Hearst à l’exception de la Secrétaire-exécutive et des personnes dont la classification est supérieure à celle de la Secrétaire-exécutive, des enseignants suppléants tels que définis dans la *Loi sur l’Éducation*, L.R.O. 1980, C. 129, telle que modifiée et les personnes qui travaillent régulièrement vingt-quatre (24) heures ou moins par semaine, les étudiants qui travaillent pendant leurs vacances scolaires, et les personnes au nom de qui un syndicat détient des droits de négociations en date du 17 avril 1991” (19 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “tous les employés de l’intimé dans le District de Hearst qui travaillent régulièrement vingt-quatre (24) heures ou moins par semaine, et les étudiants qui travaillent pendant leurs vacances scolaires, à l’exception de la Secrétaire-exécutive, et des personnes dont la classification est supérieure à celle de la Secrétaire-exécutive et des enseignants suppléants tels que définis dans la *Loi sur l’Éducation*, L.R.O. 1980, c. 129, telle que modifiée et les personnes au nom de qui un syndicat détient des droits de négociations en date du 17 avril 1991” (15 employees in unit) (*Having regard to the agreement of the parties*)

0211-91-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Tilbury (Respondent)

Unit: “all employees of the respondent in the Town of Tilbury, save and except foreman, persons above the rank of foreman and the public works coordinator” (15 employees in unit) (*Having regard to the agreement of the parties*)

0213-91-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. National Grocers Co. Ltd. (Respondent)

Unit: “all employees of the respondent in London, Ontario, at its cash and carry operation, save and except the manager, those above the rank of manager and persons regularly employed for not more than 24 hours per week” (3 employees in unit) (*Having regard to the agreement of the parties*)

0227-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Hotels Ltd. c.o.b. as C.P. Rail Bunkhouse (Respondent)

Unit: “all employees of the respondent at the C.P. Rail Bunkhouse in the Town of White River, save and except the manager, persons above the rank of manager and persons regularly employed for not more than 24 hours per week” (3 employees in unit) (*Having regard to the agreement of the parties*)

0231-91-R: Ontario Public Service Employees Union (Applicant) v. Community Living South Muskoka (Respondent)

Unit: “all employees of the respondent in the District Municipality of Muskoka, save and except supervisors, persons above the rank of supervisor, office, clerical and employees in bargaining units for which any trade union held bargaining rights as of April 18, 1991” (69 employees in unit) (*Having regard to the agreement of the parties*)

0232-91-R: Amherstburg Ambulance Attendants Association (Applicant) v. Amherstburg Anderdon Malden Volunteer Ambulance Service (Respondent)

Unit: “all employees of the respondent in and out of the Town of Amherstburg, save and except the Manager, persons above the rank of Manager, Dispatchers, Secretary Treasurer, persons regularly employed for not more than 24 hours per week” (3 employees in unit) (*Having regard to the agreement of the parties*)

0256-91-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. 366838 Ontario Ltd. c.o.b. as City-Wide Taxi (Respondent)

Unit: “all employees of the respondent operating under the roof sign City-Wide Taxi in the City of Oshawa, save and except supervisors, persons above the rank of supervisor, dispatchers, call takers, maintenance staff, office, and clerical staff, and multi-plate/multi-car owners/leasees” (106 employees in unit) (*Having regard to the agreement of the parties*)

0257-91-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Wendy’s Restaurants of Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at 243 Oxford Street East in London, save and except shift coordinators and persons above the rank of shift coordinator” (52 employees in unit)

0298-91-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Murphy Distributing Ltd. (Respondent)

Unit: “all employees of the respondent in the City of St. Catharines, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*)

0342-91-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Palcor Construction Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0343-91-R: United Paperworkers International Union (Applicant) v. District of Thunder Bay Homes for the Aged Birchwood Terrace (Respondent)

Unit: “all employees of the respondent in the Township of Terrace Bay, save and except supervisors, persons above the rank of supervisor, registered nurses, office staff, students employed in a co-operative training program and students employed during the school vacation period” (30 employees in unit) (*Having regard to the agreement of the parties*)

0348-91-R: United Steelworkers of America (Applicant) v. Hillcrest Lodge (Respondent)

Unit: “all employees of the respondent in the City of Orillia, save and except supervisors, persons above the rank of supervisor” (23 employees in unit) (*Having regard to the agreement of the parties*)

0358-91-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Dielco Industrial Contractors Ltd. (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers’ apprentices in the employ of the respondent in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0361-91-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Hamilton (Respondent)

Unit: “all office and clerical employees of the respondent in the Township of Hamilton, save and except the roads foremen and arena manager and persons above the rank of roads foreman and arena manager, the secretary to the chief administrative officer and persons for whom any trade union held bargaining rights as of April 30, 1991” (9 employees in unit) (*Having regard to the agreement of the parties*)

0372-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. 888538 Ontario Ltd. o/a Holiday Inn Owen Sound (Respondent)

Unit #1: “all employees of the respondent in Owen Sound, save and except the assistant manager, persons above the rank of assistant manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (27 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in Owen Sound, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the assistant manager, persons above the rank of assistant manager” (27 employees in unit) (*Having regard to the agreement of the parties*)

0376-91-R: Canadian Union of Public Employees (Applicant) v. Brockville General Hospital (Respondent)

Unit: “all employees of the respondent in Brockville employed as registered nursing assistants regularly employed for not more than 24 hours per week and students employed during the school vacation period as registered nursing assistants, save and except ward clerks, department heads, graduate dietitians, graduate nursing staff, graduate pharmacists, technical personnel, chief engineer, office staff professional staff, student dietitians, undergraduate nursing staff, undergraduate pharmacists, supervisors, persons above the rank of

supervisor and persons for whom any trade union held bargaining rights as of May 1, 1991” (38 employees in unit) (*Having regard to the agreement of the parties*)

0386-91-R: United Steelworkers of America (Applicant) v. Country Village Health Care Centre (Respondent)

Unit: “all employees of the respondent in the County of Essex, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff” (91 employees in unit) (*Having regard to the agreement of the parties*)

0412-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. McCarthy Milling Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, lab technicians, office and clerical staff” (37 employees in unit) (*Having regard to the agreement of the parties*)

0438-91-R: Ontario Public Service Employees Union (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: “all employees of the respondent at the Ontario Police College in Aylmer, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week” (17 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

3027-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Atlas Specialty Steels, a Division of Sammi Atlas Inc. (Respondent) v. Independent Canadian Steelworkers Union (Intervener)

Unit: “all employees of the respondent at its Atlas Specialty Steels Division employed in and about the Company’s manufacturing plant located at Welland, Ontario, Canada, but excluding all salaried employees, Section Leaders, Maintenance Supervisors, Melters, and Assistant Rollers and Rollers of the Blooming and Bar Mills or any employee acting full-time in a supervisory or confidential capacity whether on salary or hourly pay, Watchmen and members of the Plant Protection Department” (1008 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	1008
Number of persons who cast ballots	915
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	464
Number of ballots marked in favour of intervener	452

3156-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Enera Electrical & Building Controls, a Division of Ashrae Controls Inc. (Respondent) v. Ontario Controls Federation (Intervener)

Unit: “all journeymen electricians and registered apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen electricians and registered apprentices in the employ of the respondent in all sectors of the construction industry in the Province of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (13 employees in unit)

Number of names of persons on revised voters’ list	13
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	12
Number of ballots marked in favour of intervener	0

3346-90-R: United Steelworkers of America (Applicant) v. Astro Dyeing & Finishing (Canada) (1988) Ltd. (Respondent) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Intervener)

Unit: "all employees of the Company in Hawkesbury, Ontario, save and except for office staff, foremen and persons above the rank of foreman" (43 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	44
Number of persons who cast ballots	37
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	31
Number of ballots marked in favour of intervener	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2956-90-R: Ontario Public Teachers' Federation (Applicant) v. Fort Frances-Rainy River Board of Education (Respondent) v. Ontario Secondary School Teachers' Federation, District #53 Office (Intervener) v. Group of Employees (Objectors)

Unit: "all educational assistants employed by the respondent in the District of Rainy River, save and except the superintendent of education and persons above the rank of superintendent of education" (46 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	34
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	13

3130-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Ottawa Board of Education (Respondent) v. The Ottawa Board of Education Employees Union ('O.B.E.E.U.') (Intervener)

Unit: "all its employees engaged in maintenance services and plant operations, save and except persons employed in Student Transportation, above the rank of Assistant to the Supervisor of Busing; in custodial services, above the rank of Centre Custodian; in trades and maintenance, above the rank of Maintenance Chief; in cafeteria services, above the rank of Assistant Cafeteria Manager; at MacSkimming Farm, above the rank of Assistant to the Outdoor Education Technicians; as office staff, stock keepers, clerks of supply; for not more than 12 hours per week on a regular basis, who are students and are employed during the school vacation periods; persons employed under a work incentive programme sponsored by other than the Employer as a casual" (694 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	694
Number of persons who cast ballots	493
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	310
Number of ballots marked in favour of intervener	176

3464-90-R: International Ladies' Garment Workers' Union (Applicant) v. Simmons Canada Inc. (Respondent)

Unit: "all employees of the respondent in the City of Cornwall, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, quality assurance coordinator and students employed during the school vacation period" (102 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	102
Number of persons who cast ballots	76
Number of ballots marked in favour of applicant	52
Number of ballots marked against applicant	24

Applications for Certification Dismissed Without Vote

2814-90-R; 2815-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 663 (Applicant) v. Alloy Fab Ltd. (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Intervener) (4 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2843-90-R; 2914-90-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Metropolitan General Hospital (Respondent) v. Service Employees' International Union, Local 210 (Intervener) (242 employees in unit)

3234-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Toronto Interiors Ltd. (Respondent) (2 employees in unit)

3360-90-R: Hotel, Motel & Restaurant Employees Union, Local 442 (Applicant) v. Sheraton Fallsview Hotel & Conference Centre (Respondent) (108 employees in unit)

0073-91-R: United Food & Commercial Workers International Union (Applicant) v. Niagara Paper Ltd. (Respondent) (36 employees in unit)

0192-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Northern Sealants Ltd. (Respondent) (2 employees in unit)

0218-91-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Massey Town Wholesale Inc. (Respondent) v. Group of Employees (Objectors) (14 employees in unit)

0241-91-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Allan Michaels Electric Ltd. (Respondent) (11 employees in unit)

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2729-90-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Technology Service Corporation Inc. and CTG, a division of TIE/Communications Canada Inc. (Respondents)

Unit: "all employees of the respondents employed in the City of Kitchener, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	6

3195-90-R: Teamsters, Chemical, Energy & Allied Workers, Local 424 (Applicant) v. ACIC (Canada) Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Brantford, save and except those above the rank of supervisor, office, sales and technical staff" (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	8

Applications for Certification Withdrawn

2551-89-R; 2623-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Rome Carpentry Co. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

2665-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Venasse D.J. and Construction Ltd. (Respondent)

3467-90-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Vol Electric Ltd. (Respondent)

0024-91-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. City Welding (Sudbury) Ltd. (Respondent)

0055-91-R: United Steelworkers of America (Applicant) v. Friction Tech Inc. (Respondent)

0078-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. C. N. Crew Hostel (Respondent)

0159-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bruno Contracting (Thunder Bay) Ltd. (Respondent)

0195-91-R: Teamsters, Local Union 938 (Applicant) v. Riello Canada Inc. (Respondent)

0196-91-R: Canadian Union of Public Employees (Applicant) v. Port Hope & District Hospital (Respondent)

0226-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Tricar Developments Inc. (Respondent)

0331-91-R; 0332-91-R; 0334-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ben Bruinsma & Sons Ltd. (Respondent) v. Construction Workers, Local 53, Christian Labour Association of Canada (Intervener)

0336-91-R: Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Can-Ar Coach Service, Division of Tokmakjian Ltd. (Respondent)

0346-91-R: International Brotherhood of Electrical Workers, Local 120 (Applicant) v. Pro Electric Inc. (Respondent)

0374-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Hotels Ltd./C.N. Crew Hostel (Respondent)

0397-91-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Chubb Security Systems a division of Racal-Chubb Canada Inc. (Respondent)

0458-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. 762000 Ontario Inc. and/or Eagle Landscaping Ltd. (Respondent)

50459-91-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Harvey's Restaurant - Windsor, Ont. (Respondent)

0520-91-R: United Steelworkers of America (Applicant) v. Northland Power Partnership (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0007-90-R: Labourers' International Union of North America, Local 1059 and Labourers' International

Union of North America, Ontario Provincial District Council (Applicants) v. Ably Concrete Floor Ltd. and Turner Murray Contractors Inc. (Respondents) (*Dismissed*)

0141-90-R: Peter Goodall (Applicant) v. Select Commercial Laundries Inc., and Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Respondents) (*Dismissed*)

3041-90-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. D.G.E. (1990) Ltd. and Don Gladu Electric Ltd. and don Gladu Electric (1990) Ltd. and Gladu Electric (Sudbury) Ltd. and D & G Electrical Contractors Ltd. (Respondents) (*Withdrawn*)

3330-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Sidney L. Cohen Ltd. and Saul Ellis Ltd. c.o.b. as Plan Electric Co., DBM Heating & Air-Conditioning Ltd. c.o.b. as DBM Mechanical and Plan Mechanical Ltd. (Respondents) (*Withdrawn*)

3331-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Torwest Electric Ltd. (Respondent) (*Withdrawn*)

0037-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Guy Forward, o/a 'FWD Contracting' and Guy Forward Contractors Inc. (Respondents) (*Granted*)

0064-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Lonco Construction Ltd. and Tricar Developments Inc. (Respondents) (*Withdrawn*)

0070-91-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Vol Electric Ltd., Peter Volpato c.o.b. as Gemini Maintenance Company (Respondents) (*Withdrawn*)

0094-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Capelas Homes Ltd. and Eagle Framers & Carpenters Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3247-89-R; 3305-89-R: The Carleton Roman Catholic Separate School Board Employees' Association and the Ottawa Board of Education Employees' Union (Applicants) v. The Ottawa-Carleton French Language School Board (Full Board), The Ottawa-Carleton French Language School Board (Catholic Sector), and The Ottawa-Carleton French Language School Board (Public Sector) (Respondent) v. Service & Commercial Employees Union, Local 272 (Intervener) (*Dismissed*)

0007-90-R: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Ably Concrete Floor Ltd. and Turner Murray Contractors Inc. (Respondents) (*Dismissed*)

0141-90-R: Peter Goodall (Applicant) v. Select Commercial Laundries Inc., and Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Respondents) (*Dismissed*)

2259-90-R: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen and Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. CTM Developments and Terri Miller c.o.b. as U.S. Tile (Respondents) (*Withdrawn*)

3330-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Sidney L. Cohen Ltd. and Saul Ellis Ltd. c.o.b. as Plan Electric Co., DBM Heating & Air-Conditioning Ltd. c.o.b. as DBM Mechanical and Plan Mechanical Ltd. (Respondents) (*Withdrawn*)

3331-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Torwest Electric Ltd. (Respondent) (*Withdrawn*)

3448-90-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Ronnie Gee's Sports Palace (Respondent) v. The Westbury Hotel (Intervener) (*Granted*)

0038-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Guy Forward, o/a 'FWD Contracting' and Guy Forward Contractors Inc. (Respondents) (*Granted*)

0043-91-R: United Steelworkers of America (Applicant) v. Hovey Industries Ltd. (Respondent) (*Withdrawn*)

0064-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Lonco Construction Ltd. and Tricar Developments Inc. (Respondents) (*Withdrawn*)

0066-91-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Corbett Electric Ltd., Metrocor Ltd., Don Gladu Electric (1990) Inc., Don Gladu Electric (1991) Inc. and Don Gladu Electrical Ltd. (Respondents) (*Withdrawn*)

0070-91-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Vol Electric Ltd., Peter Volpato c.o.b. as Gemini Maintenance Company (Respondents) (*Withdrawn*)

0077-91-R: Nipissing University College (Applicant) v. Canadore Community College and O.P.S.E.U. (Respondents) (*Granted*)

0094-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Capelas Homes Ltd. and Eagle Framers & Carpenters Ltd. (Respondents) (*Withdrawn*)

0262-91-R: Golden Nugget Saloon (Applicant) v. Hospitality, Commercial & Service Employees Union, Local 73 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3292-89-R: Hector Giroux (Applicant) v. International Brotherhood of Painters & Allied Trades (Respondent) v. Nickel Belt Aluminum of Sudbury Ltd. (Intervener) (*Withdrawn*)

0021-90-R: Angelo Ganassin (Applicant) v. The United Brotherhood of Carpenters and Joiners of America; the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America; the Carpenters District Council of Toronto and Vicinity; Lake Ontario District Council; Western Ontario District Council; Ontario Acoustical & Drywall District Council, and their affiliated Local Unions 18, 27, 38, 93, 249, 397, 446, 494, 572, 675, 785, 1071, 1256, 1316, 1450, 1669, 1946, 1988, 2041, 2050, 2222, 2451, 2486 & 2965 (Respondents) v. D-K Construction Ltd. (Intervener) (*Dismissed*)

3301-89-R: Donald Kennedy (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Respondent) v. Gresan Mechanical (Sudbury) Ltd. (Intervener)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices and welders in the employ of Gresan Mechanical (Sudbury) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foremen" (1 employee in unit) (*Granted*)

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1

3311-90-R: Monique Levesque (Applicant) v. Hotels, Clubs, Restaurants & Taverns Employees Union, Local 261 (Respondent) v. 773944 Ontario Ltd. o/a Cafe Contempra (Intervener)

Unit: "all employees of the employer at Cafe Contempra in the City of Ottawa, save and except one chef, one manager and one assistant manager" (15 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	11

3326-90-R: Michael S. Gazo (Applicant) v. Service Employees Union, Local 210 (Respondent) v. Chatham & District Ambulance Service Ltd. (Intervener)

Unit: "all employees of Chatham & District Ambulance Service in Chatham and Wallaceburg, save and except supervisors, persons above the rank of supervisor and office staff" (34 employees in unit) (*Having regard to the agreement of the parties*) (*Granted*)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	27
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	18

3371-90-R: Neil Bergeron (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 880 (Respondent) v. Canadian Welding & Manufacturing Co. Ltd. (Employer) (*Withdrawn*)

3449-90-R: Donovan Washington Palmer (Applicant) v. Amalgamated Clothing & Textile Workers Union (Respondent) v. Paramount Bedding Upholstery Inc. (Intervener) (*Withdrawn*)

0080-91-R: John Carreiro and The Bargaining Union Employees of McCarthy Milling Ltd. (Applicant) v. Local 242 American Federation of Grain Millers A.F.L., C.I.O., C.L.C. (Respondent) v. McCarthy Milling Ltd. (Intervener) (40 employees in unit) (*Granted*)

0172-91-R: Nortown Plumbing Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Low Rise Residential Division) (Respondent) (*Withdrawn*)

0345-91-R: Gary Punchard et al. (Applicant) v. The Toronto Typographical Union No. 91 Communications Workers of America/Printing, Publishing & Media Workers Sector (Respondent) v. Gordon Brockie (Intervener) (*Withdrawn*)

0394-91-R: Laurne Chynoweth, William Mercer, Aldo Aceti, Uli Kuehnen, John Angelone (Applicants) v. International Brotherhood of Electrical Workers, Local 105 (Respondent) v. Southmount Cable Ltd. (Intervener) (*Withdrawn*)

0507-91-R: Guy Forward, o/a 'FWD Contracting' and Guy Forward Contractors Inc. (Applicant) v. Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0350-91-U: Hickeson-Langs Supply Company (Applicant) v. Teamsters Local No. 419 and Sam Scrivo, Gary Sloan, Ron Scott, Nick Tarasco, George Fyfe, Ian Quin, Dan Holland, Paul White, Armand Lamondy, Wayne Hebert, Gerry Dault and Clay Bowring (Respondents) (*Granted*)

0447-91-U: Fieldfresh Farms Inc. (Applicant) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied

Employees Local No. 647, Tom Fraser and the Respondent Employees listed on Schedule 'A' (Respondents) (*Granted*)

0518-91-U: Catalytic Maintenance Inc. (Applicant) v. Bill Hillis, Fred Michitsch, Don Hodges, Joao DeOliveira, Mike Sorensen, Gary Charlton, Steve Adams & Harold Dailey (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0122-89-U: Gary Deneault, Owen Langevin and Ken Porter (Complainants) v. The Motion Picture Studio Production Technicians Local 873 of the International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada (Respondents) (*Withdrawn*)

123-89-U: Gary Deneault, Owen Langevin and Ken Porter (Complainants) v. Daniel Bradette, Beverly Carr, John Fisher, Charles Goodchild, et al. (Respondents) (*Withdrawn*)

1555-89-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Siding I.P.E. Ltd. (Respondent) (*Granted*)

2095-89-U: United Brotherhood of Carpenters & Joiners of America, Local 38 (Complainant) v. Peter Kiewit Sons Co. Ltd. and Labourers' International Union of North America, Local 837 (Respondent) (*Dismissed*)

2317-89-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Venasse D.J. and Construction Ltd. (Respondent) (*Withdrawn*)

0009-90-U: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Complainants) v. Ably Concrete Floor Ltd. and Turner Murray Contractors Inc. (Respondents) (*Dismissed*)

0212-90-U: Canadian Paperworkers Union (Complainant) v. Great Lakes Community Credit Union (formerly known as Great Lakers Credit Union) (Respondent) (*Withdrawn*)

0332-90-U: Ontario Nurses' Association (Complainant) v. George St. L. McCall Chronic Care Wing of the Queensway General Hospital (Respondent) (*Granted*)

0661-90-U: Amalgamated Clothing & Textile Workers Union (Complainant) v. Angelica Uniforms of Canada Ltd. (Respondent) (*Granted*)

0842-90-U: Energy & Chemical Workers Union (Applicant) v. I.C.G. Utilities (Ontario) Ltd. (Respondent) (*Dismissed*)

1621-90-U: Prem Lal (Complainant) v. Aluminum, Brick & Glass Workers International Union, Local 260G (Respondent) v. Consumers Glass Division of Consumers Packaging Inc. (Intervener) (*Dismissed*)

1851-90-U: Northfield Metal Products Ltd. (Complainant) v. Albert Parsons, and Glass, Molders, Pottery, Plastics & Allied Workers International Union (Respondents) (*Granted*)

2183-90-U: Labourers' International Union of North America, Local 527 (Complainant) v. Ken Scharf Construction Ltd. (Respondent) (*Withdrawn*)

2424-90-U: International Union of Operating Engineers, Local 793 (Complainant) v. Ottawa Greenbelt Construction Ltd. (Respondent) (*Granted*)

2430-90-U: Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 880 (Complainant) v. A & H Bolt & Nut Company Ltd. c.o.b. as The Fastner Centre (Respondent) (*Withdrawn*)

2538-90-U: Canadian Union of Public Employees, Local 1344 (Complainant) v. The Board of Education for the City of Hamilton (Respondent) (*Withdrawn*)

2594-90-U: Tony Da Costa (Complainant) v. Labourers' International Union of North America, Local 1081 and Armbr Materials & Construction Ltd. (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener) (*Dismissed*)

2610-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Royal Doulton Canada Ltd. (Respondent) (*Withdrawn*)

2704-90-U: United Steelworkers of America (Complainant) v. SKD Company - Milton Division (Respondent) (*Withdrawn*)

2717-90-U: Libbey-St. Clair Ltd. (Complainant) v. Aluminum, Brick & Glass Workers International Union, AFL-CIO-CLC and its Local 235G (Respondents) (*Withdrawn*)

2781-90-U: International Union of Operating Engineers, Local 793 (Complainant) v. Atcost Soil Drilling Inc. (Respondent) (*Withdrawn*)

2869-90-U: Ontario Public Service Employees Union (Complainant) v. Cybermedix Health Services Ltd. (Respondent) (*Withdrawn*)

2876-90-U: United Brotherhood of Carpenters & Joiners of America, Local 785 (Complainant) v. Freure Homes Ltd. and/or Freure Construction (Respondents) (*Withdrawn*)

2949-90-U; 3094-90-U; 3116-90-U: Douglas Gavin (Complainant) v. Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Respondent) v. EPSCA and Ontario Hydro (Interveners) (*Dismissed*)

2974-90-U: Labourers' International Union of North America, Local 183 (Complainant) v. 470187 Ontario Ltd., known as 'Kennedy Apartments', 33 Kennedy Road South, Brampton (Respondent) (*Withdrawn*)

2975-90-U: Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation No. 385 (Respondent) (*Withdrawn*)

3000-90-U: Western Ontario Joint Board Amalgamated Clothing & Textile Workers' Union (Complainant) v. Bradshaw Stradwick (1979) Inc. (Respondent) (*Withdrawn*)

3002-90-U: André Plante (Complainant) v. Association des Professeurs d'Université de Hearst (Respondent) (*Withdrawn*)

3003-90-U: Michel Thouin (Complainant) v. Association des Professeurs d'Université de Hearst (Respondent) (*Withdrawn*)

3004-90-U: Martine Tremblay (Complainant) v. Association des Professeurs d'Université de Hearst (Respondent) (*Withdrawn*)

3013-90-U: Graphic Communications International Union, Local 500M (Complainant) v. Economy Web Printing Inc. (Respondent) (*Withdrawn*)

3015-90-U: Labourers' International Union of North America, Local 183 (Complainant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto & Vicinity (Respondent) (*Withdrawn*)

3053-90-U: United Brotherhood of Carpenters & Joiners of America, Local 3054 (Complainant) v. General Coach a division of Citair Inc. (Respondent) (*Withdrawn*)

3063-90-U: International Brotherhood of Electrical Workers, Local 1687 (Complainant) v. DGE (1990) Ltd.

and Don Gladu Electric (1990) Ltd. and Gladu Electric (Sudbury) Ltd. and Don Gladu Electric Ltd. and D & G Electrical Contractors Ltd. (Respondents) (*Withdrawn*)

3066-90-U: Vernon W. Yorgason (Complainant) v. York University, York University Faculty Association (Respondent) (*Dismissed*)

3101-90-U: Victoria Montgomery (Complainant) v. I.A.T.S.E., Local 873 (Respondent) (*Dismissed*)

3127-90-U: Judith L. Blais (Complainant) v. Ottawa Board of Education Employees Union (Respondent) (*Withdrawn*)

3142-90-U; 3143-90-U: Tele-Direct (Publications) Inc. (Complainant) v. Syndicat des Employees et Employees Professionnels-les et de Bureau, Section Locale 57 (Respondent) (*Withdrawn*)

3144-90-U: Joe Zinger (Complainant) v. Gord Brand (Respondent) v. Canadian Transport Workers Union (CTWU) (Intervener) (*Withdrawn*)

3152-90-U: Energy & Chemical Workers Union, Local 593 (Complainant) v. Petro-Canada Products, A Division of Petro-Canada Inc. Lake Ontario Refinery, Mississauga Plant, Mississauga, Ontario (Respondent) (*Withdrawn*)

3171-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Sarnia Loeb - IGA (Respondent) (*Withdrawn*)

3221-90-U: Ethier, Aurele Leo (Complainant) v. C.U.P.E., Locals 44B & 2723 (Respondents) v. City of Burlington (Intervener) (*Dismissed*)

3224-90-U: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Complainant) Denos Aluminum Installation Ltd. (Respondent) (*Withdrawn*)

3227-90-U: International Leather Goods, Plastics & Novelty Workers International Union, Local 8 (Complainant) v. Root Chemical Co. Inc. (Respondent) (*Withdrawn*)

3233-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Ratcliffs/Severn Ltd. (Respondent) (*Withdrawn*)

3282-90-U: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Complainant) v. Premdoor Inc. (Respondent) (*Withdrawn*)

3325-90-U: Service Employees' Union, Local 210 (Complainant) v. The Windsor & Essex County Real Estate Board (Respondent) (*Withdrawn*)

3334-90-U: Wayne Crawford (Maint. Group Former LU 4694) (Complainant) v. Angelo Mei; LU 4694, LU 2251 U.S.W.A. and The Algoma Steel Corporation Ltd. (Respondents) (*Withdrawn*)

3352-90-U: Service Employees Union, Local 183 (Complainant) v. Aye Company Ltd. (Respondent) (*Dismissed*)

3354-90-U: Canadian Union of Public Employees and its Local 3474 (Complainant) v. The Riverside Hospital of Ottawa (Respondent) (*Withdrawn*)

3358-90-U: Independent Canadian Steelworkers Union (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) (*Dismissed*)

3365-90-U: Sharon Settino (Complainant) v. United Steelworkers of America on behalf of Local 3950 (Respondent) (*Withdrawn*)

3374-90-U: Eva Gallagher (Complainant) v. Hotel Employees, Restaurant Employees Union, Local 75 and Skyline Airport Tower & Hotel (Respondents) (*Withdrawn*)

3380-90-U: Ontario District Council of the International Ladies Garment Workers' Union (Complainant) v. Lady Manhattan of Canada (Respondent) (*Withdrawn*)

3385-90-U; 3386-90-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. Bren Electrical Contractors Ltd. and Torwest Electric Ltd. (Respondents) (*Withdrawn*)

3423-90-U: Vladimir Rogovsky, Luv Kushner and Danna Fernandez et al. (Complainants) v. Teamsters, Local Union 938 and Charles Thibault and Sam Schouten (Respondent) (*Withdrawn*)

3424-90-U: Daniel Adusei (Complainant) v. Ontario Nurses' Association (Local 54) (Respondent) (*Withdrawn*)

3425-90-U: Felicia Adusei (Complainant) v. The Clarke Institute of Psychiatry (Respondent) (*Withdrawn*)

3445-90-U: Service Employees' Union, Local 210 (Complainant) v. Pinecrest Manor Nursing Home (Respondent) (*Withdrawn*)

3455-90-U: Retail, Wholesale & Department Store Union, Local 440, Ideal Dairy Products Division Oshawa (Complainant) v. Retail, Wholesale & Department Store Union, Local 440 (RWDSU) (Respondent) (*Withdrawn*)

3456-90-U: Brian Desautels (Complainant) v. Algoma Steel and Local Union 2251 United Steelworkers (Respondents) (*Withdrawn*)

0018-91-U: Zeki Turker (Complainant) v. Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 880 (Respondent) (*Withdrawn*)

0025-91-U: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Complainant) v. City Welding (Sudbury) Ltd. (Respondent) (*Withdrawn*)

0028-91-U: Canadian Paperworkers Union, CLC, Local 134 (Complainant) v. Abitibi-Price Inc. Thunder Bay Division (Respondent) (*Withdrawn*)

0036-91-U: Baldev Singh Sohi (Complainant) v. Capital Disposal Equipment Inc. (Respondent) v. United Steelworkers of America, Local 3950 (Intervener) (*Dismissed*)

0039-91-U: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Complainant) v. Guy Forward, o/a 'FWD Contracting' and Guy Forward Contractors Inc. (Respondents) (*Granted*)

0063-91-U: Niagara Health Care & Service Workers Union, Local 302 Affiliated with the Christian Labour Association of Canada (Complainant) v. Caduceus Living Centres (Fort Erie) Ltd. Partnership c.o.b. as Residence on Garrison Rd. (Respondents) (*Withdrawn*)

0067-91-U: Ontario Public Service Employees Union (Complainant) v. Parnell Foods Ltd. (Respondent) (*Withdrawn*)

0075-91-U; John Patterson (Complainant) v. United Food & Commercial Workers International Union, Local 175 and Great Atlantic & Pacific Company of Canada Ltd. (Respondent) (*Withdrawn*)

0084-91-U: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 493 (Complainant) v. Norev Canada Inc. c.o.b. as Norev Sandblasting Ltd. and/or Northern Industrial Refractories Ltd. (Respondent) (*Withdrawn*)

0090-91-U: London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. 809950 Ontario Inc. c.o.b. as Pinehill Cottage (Respondent) (*Granted*)

0095-91-U: Joan McDonald and Elisabeth Williams (Complainants) v. Gabriel of Canada, Joe Fernandes, Jose Gnappa, Tracy Hanna; I.A.M., Local 1295, Margaret Neil, Javed Mirza, Chico Pacheco (Respondents) (*Withdrawn*)

0107-91-U: International Brotherhood of Electrical Workers, Local 636 (Complainant) v. Mississauga Hydro Electric Commission (Respondent) (*Withdrawn*)

0164-91-U: United Steelworkers of America (Complainant) v. Bucyrus Blades of Canada Ltd. (Respondent) (*Withdrawn*)

0166-91-U: Ontario Public Service Employees Union (Complainant) v. Sheridan College (Respondent) (*Withdrawn*)

0174-91-U: Sucha Singh Dhillon (Complainant) v. United Steelworkers of America, Local 14831 (Respondent) (*Withdrawn*)

0183-91-U: United Food & Commercial Workers International Union (Complainant) v. Brewers Retail Inc. (Respondent) (*Withdrawn*)

0187-91-U: Octavio V. Marajas (Complainant) v. United Steelworkers of America and Staff Rep. John Fitzpatrick United Steel Workers of America, Local 8505 and these executives, Janet Dunlop (Pres.), Chad Singh (Chief Shop Steward) (Respondents) (*Withdrawn*)

0209-91-U: Phyllis Zammit (Complainant) v. Union Offices International (Respondent) (*Withdrawn*)

0215-91-U: Karen S. Maclean (Complainant) v. Office & Professional Employees International Union (Respondent) (*Withdrawn*)

0230-91-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Village Central Investments Inc. c.o.b. as Village Foodtown and/or Village Grocer Foodtown (Township of Armour, Ontario) (Respondent) (*Withdrawn*)

0243-91-U: Bev Thellefsen (Complainant) v. Benny Haulage and Union Local 879 (Respondents) (*Withdrawn*)

0247-91-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Sandford I.G.A. (City of Hamilton, Ontario) (Respondent) (*Withdrawn*)

0249-91-U: Randy Lee Pratt (Complainant) v. C.A.W. Union Local 1520 (Respondent) (*Withdrawn*)

0278-91-U: International Ladies' Garment Workers' Union (Complainant) v. Simmons Canada Inc. (Respondent) (*Withdrawn*)

0279-91-U: David A. Shuttleworth (Complainant) v. Metropolitan Toronto Civic Employees' Union (Local 43) (Respondent) (*Withdrawn*)

2083-91-U: Hospitality, Commercial & Service Employees Union, Local 73 of the Hotel Employees Restaurant Employees International Union (Complainant) v. 510412 Ontario Ltd. c.o.b. as the Waverley Hotel (Respondent) (*Withdrawn*)

0288-91-U: United Food & Commercial Workers International Union (Complainant) v. Niagara Paper Ltd. (Respondent) (*Withdrawn*)

37-91-U: Robert James Mically #2216 (Clock) (Complainant) v. Board of Governors (Respondent) (*Withdrawn*)

0352-91-U: Basil C. Morris (Complainant) v. United Food & Commercial Workers International Union - Loblaw's - Toronto, ON, United Food & Commercial Workers International Union - Loblaw's - London, ON (Respondent) (*Withdrawn*)

FINANCIAL STATEMENT

0059-91-M: Arthur Varty (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 18 Hamilton, Tom Fenwick Financial Secretary & Business Manager (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

2123-89-JD: United Brotherhood of Carpenters & Joiners of America, Local 446 (Complainant) v. Labourers' International Union of North America, Local 1036 and Nicholls-Radtke Ltd. (Respondents) (*Withdrawn*)

0050-91-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Complainant) v. International Association of Bridge, Structural & Ornamental Ironworkers and Ontario Hydro (Respondents) (*Withdrawn*)

0313-91-JD: Sayers & Associates Ltd. (Complainant) v. Sheet Metal Workers' International Association, Local 30 and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0892-89-M: North York Public Library Board (Applicant) v. Canadian Union of Public Employees, Local 771 (Respondent) (*Dismissed*)

0604-90-M: The Corporation of the City of Timmins (Applicant) v. Canadian Union of Public Employees, Local 434 (Respondent) (*Dismissed*)

1064-90-M: Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Applicant) v. Talisman Motor Inn (Respondent) (*Dismissed*)

2543-90-M: Office & Professional Employees International Union, Local 343 (Applicant) v. St. Catharines Civic Credit Union Ltd. (Respondent) (*Dismissed*)

2883-90-M: Canadian Union of Public Employees and its Local 29 (Applicant) v. Employee's Association, St. Mary's of the Lake Hospital; St. Mary's of the Lake Hospital and Ongwanada Hospital (Respondents) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2577-90-OH: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 29 and Tony DeLuco (Complainant) v. Consumer Glass (A Member of Consumers Packaging Group) (Respondent) (*Withdrawn*)

3100-90-OH: Victoria Montgomery (Complainant) v. Rawi-Sherman Films Inc. (Respondent) v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Motion Picture Studio Production Technicians, Local 873 (Intervener) (*Dismissed*)

3158-90-OH: Ontario Public Service Employees Union, Local 233 (Complainant) v. Ministry of Correctional Services (Guelph Correctional Centre) (Respondent) (*Withdrawn*)

3249-90-OH: Wendy Knelsen (Complainant) v. Presstran Industries, Div. of Magna (Respondent) (*Withdrawn*)

3421-90-OH: Joseph Thomas Holliday (Complainant) v. Cayuga Material & Construction Co. Ltd. (Respondent) (*Withdrawn*)

3451-90-OH: David Surgeant, an employee represented by the C.A.W. Canada., A.G. Simpson Unit (Complainant) v. Larry Hooper, Supervisor working for A.G. Simpson Co. Ltd., Oshawa Plant (Respondent) (*Withdrawn*)

0042-91-OH: Ian Floyd (Complainant) v. Metro Canada Warehousing (Respondent) (*Withdrawn*)

0125-91-OH: Mike Sampson (Complainant) v. Minnova Inc. Winston Lake Division (Respondent) (*Withdrawn*)

0168-91-OH: Mr. Dave Charette (Complainant) v. Mr. Keith Cushnie and Inco Ltd. (Respondents) (*Withdrawn*)

ENVIRONMENTAL PROTECTION ACT

2423-90-EP: Alan G. Marshall (Complainant) v. Varnicolor Chemical Ltd. (Respondent) (*Granted*)

CONSTRUCTION INDUSTRY GRIEVANCES

1753-89-G: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1036 (Applicant) v. Nicholls-Radtke Ltd. (Respondent) (*Withdrawn*)

2932-89-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Elevator Company Ltd. (Respondent) (*Granted*)

0657-90-G; 0658-90-G: Labourers' International Union of North America, Local 527 (Applicant) v. Ken Scharf Construction Ltd. (Respondent) (*Withdrawn*)

1708-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. D. Dixie Drywall Inc. (Respondent) (*Granted*)

1722-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. D.O.V.V. Construction (c.o.b. Dessmark Construction and/or Siltonwood Development) (Respondent) (*Granted*)

1738-90-G: Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. 736936 Ontario Ltd. c.o.b. as CTM Developments (Respondent) (*Granted*)

2336-90-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Dufferin Roofing Ltd. (Respondent) (*Granted*)

2397-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Baywood Carpentry (Respondent) (*Withdrawn*)

2625-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ottawa Greenbelt Construction Ltd. (Respondent) (*Granted*)

2751-90-G: A Council of Trade Unions acting as the representative, and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local 183 (Applicant) v. Empire Paving (Respondent) (*Withdrawn*)

2760-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Allied Architectural Systems Ltd. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener) (*Withdrawn*)

2803-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Windsor Crane Inc. (Respondent) (*Granted*)

2810-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Cliffside Utility Contractors Ltd. (Respondent) (*Withdrawn*)

2940-90-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Master Clad Inc. (Respondent) (*Withdrawn*)

3243-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Pini Renovation & Repair (Respondent) (*Granted*)

3258-90-G: Labourers' International Union of North America, Ontario Provincial District Council, on behalf of affiliated Local Unions 183, 247, 491, 493, 527, 597, 607, 625, 837, 1036, 1059, 1081 & 1089 (Applicant) v. Consamar Inc. (Respondent) v. Pipeline Contractors Association of Canada (Intervener) (*Dismissed*)

3260-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Frankfurt Investments Ltd. (Respondent) (*Withdrawn*)

2379-90-G: Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. Can-Tario Classic Marble & Tile Ltd. (Respondent) (*Granted*)

3327-90-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Johnson Controls Ltd. (Respondent) (*Withdrawn*)

3349-90-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Landar Insulation Corporation Ltd. (Respondent) (*Withdrawn*)

3453-90-G: Labourers' International Union of North America, Local 493 (Applicant) v. FHR Construction Co. Ltd. (Respondent) (*Withdrawn*)

3454-90-G: Labourers' International Union of North America, Local 1036 and Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. R. M. Belanger Const. Ltd. (Respondent) (*Withdrawn*)

0031-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ontario Store Fixtures Inc. (Respondent) (*Withdrawn*)

0040-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Guy Forward, o/a 'FWD Contracting' and Guy Forward Contractors Inc. (Respondents) (*Granted*)

0065-91-G: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Corbett Electric Ltd., Metrocor Ltd., Don Gladu Electric (1990) Inc., Don Gladu Electric (1991) Inc. and Don Gladu Electric Ltd. (Respondents) (*Withdrawn*)

0081-91-G: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. Lomar Mechanical Corporation Ltd. (Respondent) (*Withdrawn*)

0096-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Toronto Structural Concrete Services (Respondent) (*Withdrawn*)

0108-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Kayal Construction 845288 Ontario Inc. c.o.b. (Respondent) (*Withdrawn*)

0109-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Nazarene Fine Installation (Respondent) (*Withdrawn*)

- 0112-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Cobridge Structures Inc. (Respondent) (*Withdrawn*)
- 0120-91-G:** International Brotherhood of Painters & Allied Trades, Local 1824 Painters (Applicant) v. Regional Glass & Mirror (Respondent) (*Withdrawn*)
- 0132-91-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Neelands Refrigeration Ltd. (Respondent) (*Withdrawn*)
- 0147-91-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Sidney L. Cohen Ltd. and Saul Ellis Ltd. c.o.b. as Plan Electric Co.; DBM Heating & Air Conditioning Ltd. c.o.b. as DBM Mechanical and Plan Mechanical Ltd. (Respondents) (*Withdrawn*)
- 0150-91-G:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. Laurier Carrier Ltd. (Respondent) (*Withdrawn*)
- 0151-91-G:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. F. A. Coombs Sheet Metal Ltd. (Respondent) (*Granted*)
- 0152-91-G:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. Data Air Balancing (A Division of #709312 Ontario Ltd.) (Respondent) (*Granted*)
- 0153-91-G:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. M. R. Sheet Metal Ltd. (Respondent) (*Withdrawn*)
- 0169-91-G:** Labourers' International Union of North America, Local 607 (Applicant) v. Nicholls-Radtke Ltd. (Respondent) (*Withdrawn*)
- 0175-91-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Adelaide Electric (Respondent) (*Withdrawn*)
- 0217-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America and Glenn Kitchen (Applicant) v. Eastern Construction Co. Ltd. (Respondent) (*Withdrawn*)
- 0220-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. The Rock Corporation Ltd. (Respondent) (*Withdrawn*)
- 0221-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. James A. Rice Ltd. (Respondent) (*Withdrawn*)
- 0222-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ontario Washroom Equipment Ltd. (Respondent) (*Withdrawn*)
- 0225-91-G:** International Brotherhood of Painters & Allied Trades, Local 1824 Painters (Applicant) v. Emery Glass & Aluminum Ltd. (Respondent) (*Granted*)
- 0255-91-G:** Labourers' International Union of North America, Local 493 (Applicant) v. Comstock International Ltd. (Respondent) (*Withdrawn*)
- 0259-91-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. G.C. Tech Electrical (Respondent) (*Withdrawn*)
- 0263-91-G; 0264-91-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Etobicoke Sheet Metal Company Ltd. (Respondent) (*Granted*)
- 0268-91-G:** International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) (*Withdrawn*)

- 0269-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Sunrise Backhoe Service (Respondent) (*Withdrawn*)
- 0270-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. E. S. Fox Ltd. (Respondent) (*Withdrawn*)
- 0273-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Delmar Contracting Ltd. (Respondent) (*Withdrawn*)
- 0274-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. G. Ropat Construction (Windsor) Ltd. (Respondent) (*Granted*)
- 0276-91-G:** Sheet Metal Workers' International Association, Local 235 (Applicant) v. The Parent Company Ltd. (Respondent) (*Withdrawn*)
- 0292-91-G:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Bluebird Construction Inc. (Respondent) (*Withdrawn*)
- 0295-91-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Gresan Mechanical (Respondent) (*Withdrawn*)
- 0297-91-G:** Labourers' International Union of North America, Local 607 (Applicant) v. Premier-Murphy - a Joint Venture (Respondent) (*Withdrawn*)
- 0316-91-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Drycoustic Construction Ltd. (Respondent) (*Granted*)
- 0317-91-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. H.C. Barker & Sons Ltd. (Respondent) (*Granted*)
- 0318-91-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Trident Construction Ltd. (Respondent) (*Withdrawn*)
- 0323-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Dennison Carpentry (Respondent) (*Granted*)
- 0330-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Lindsay Brothers Construction Ltd. (Respondent) (*Granted*)
- 0351-91-G:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v., Gillin Engineering & Construction Ltd. (Respondent) (*Withdrawn*)
- 0371-91-G:** Labourers' International Union of North America, Local 607 (Applicant) v. Venshore Mechanical (Respondent) (*Withdrawn*)
- 0378-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Melita Carpenters (Respondent) (*Withdrawn*)
- 0379-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. New Times Carpentry Ltd. (Respondent) (*Withdrawn*)
- 0383-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ballan Construction Ltd. (Respondent) (*Withdrawn*)
- 0389-91-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Drycoustic Construction Ltd. (Respondent) (*Withdrawn*)

0390-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Z-Tec Drywall Ltd. (Respondent) (*Withdrawn*)

0414-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bay Forming Inc. (Respondent) (*Granted*)

0419-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Capelas Homes Ltd. and Eagle Framers & Carpenters Ltd. (Respondents) (*Withdrawn*)

0475-91-G: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Inter City Construction Ltd. (Respondent) (*Granted*)

0480-91-G: International Brotherhood of Painters & Allied Trades, Local 1819 - Glaziers (Applicant) v. Al McGill Glass & Mirror (Respondent) (*Withdrawn*)

0483-91-G: International Brotherhood of Painters & Allied Trades, Local 1819 - Glaziers (Applicant) v. Skylights Plus (Respondent) (*Withdrawn*)

0486-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. Y.G.S. Inc. (Respondent) (*Granted*)

0487-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. A.N.H. Glass Ltd./Apsen Glass Ltd. (Respondent) (*Granted*)

0488-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. St. Catharines Glass & Mirror (Respondent) (*Withdrawn*)

0489-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. Whyte Glass Ltd. (Respondent) (*Withdrawn*)

0490-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Edwards Robert Elect (Respondent) (*Withdrawn*)

0494-91-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Losereit Ltd. (Respondent) (*Withdrawn*)

0512-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. Ontario Cutting & Coring (Respondent) (*Withdrawn*)

0548-91-G: International Association of Bridge, Structural & Ornamental Ironworkers and International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicants) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

0553-91-G; 0554-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Baywood Carpentry Ltd. (Respondent) (*Granted*)

0566-91-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Copper Cliff Mechanical Construction Ltd. (Respondent) (*Withdrawn*)

0568-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Capri Forming Ontario Inc. (Respondent) (*Withdrawn*)

0576-91-G: Bricklayers Union, Local #1 (Applicant) v. A. Gorgi Masonry (Respondent) (*Withdrawn*)

0578-91-G: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Dunmark Electric Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0889-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Caledon Metal Rolling Ltd. (Respondent) (*Dismissed*)

0892-89-M: North York Public Library Board (Applicant) v. Canadian Union of Public Employees, Local 771 (Respondent) (*Granted*)

0274-90-R: George Saxton on his own behalf on behalf of a Group of Employees (Applicant) v. The Ontario Provincial Council, United Brotherhood of Carpenters & Joiners of America (O.P.C.) and its Local 38 (Respondent) v. Marineland of Canada Inc. (Intervener) (*Dismissed*)

0276-91-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. The Parent Company Ltd. (Respondent) (*Granted*)

0350-91-U: Hickeson-Langs Supply Company (Applicant) v. Teamsters Local No. 419 and Sam Scrivo, Gary Sloan, Ron Scott, Nick Tarasco, George Fyfe, Ian Quinn, Dan Holland, Paul White, Armand Lamondy, Wayne Hebert, Gerry Dault and Clay Bowring (Respondents) (*Granted*)

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